

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**CYNTHIA THOMAS**

**Case No. 28-CA-186022**

**and**

**MGM GRAND HOTEL, LLC D/B/A  
MGM GRAND HOTEL AND CASINO**

**MGM GRAND HOTEL, LLC D/B/A MGM GRAND HOTEL AND CASINO'S  
MOTION FOR SUMMARY JUDGMENT**

Respondent MGM Grand Hotel, LLC d/b/a MGM Grand Hotel and Casino (hereinafter referred to as “Respondent” or “MGM”), by and through its attorneys, Jackson Lewis P.C., pursuant to Section 102.24 of the Board’s Rules and Regulations, hereby moves for an order granting it summary judgment and deferring to the Arbitrator Gary L. Axon’s April 2, 2018 Opinion and Award denying Cynthia Thomas’ (the “Charging Party” or “Thomas”) grievance. The issues raised in Thomas’ unfair labor practice charge – her allegedly unlawful termination – overlap completely with the issues raised by the Union during the discharge arbitration, and the Region should have deferred to the Award regardless of whether it adhered to the standard set forth in *Babcock Wilcox* or whether it applied traditional Board law. This Motion is supported by the Declaration of Paul T. Trimmer, attached as Exhibit 1, and the exhibits attached and referenced therein.

**I. STATEMENT OF FACTS**

Arbitrator Gary L. Axon, a member of the National Academy of Arbitrators, heard the Charging Party’s grievance over two days on November 14 and 30, 2017. Exhibit 2. He considered the testimony and evidence described below, and after the parties submitted post-

hearing briefs, he concluded that Thomas had in fact instructed a coworker to be dishonest during an investigation into potential theft – specifically, giving away free beers – and denied her grievance.

**A. Events Leading to Charging Party’s Termination.**

In the morning of September 28, 2016, manager Nathan Brown was supervising a shift at the Lobby Bar at MGM Grand. Exhibit 2 at 83:4-7. As he was walking from the lounge to the casino floor, he noticed cocktail server Fontay Jones walk up to the bar and ask bartender Lee Crain for a beer. *Id.* at 17-25. Crain gave Ms. Jones the beer even though, to Brown’s view, Jones did not ring the beer into the InfoGenesis point-of-sale system (“POS”) nor provide Crain with a ticket for that beer. *Id.* After Ms. Jones delivered the beer, Mr. Brown confronted Ms. Jones. *Id.* at 84:4-19. In response to his questions, Ms. Jones said she believed she already rang in the beer. *Id.* at 15-19. Mr. Crain acknowledged that there was no ticket for the beer, but circumstances did not permit further discussion at that time. *Id.* at 84:4-19.

Mr. Brown was a new manager. For that reason, he was concerned both because in a casino, all drinks need to be accounted for (even spills and complimentary beverages) and because in his limited experience, it was unusual for a cocktail waitress to obtain and deliver an alcoholic beverage without having recorded the beverage in Infogenesis. *Id.* at 94:10-16. This inexperience led him to speak to the Charging Party when he happened upon her later that same shift. She was both a long term cocktail server and Culinary Workers Union shop steward who was familiar with the various potential explanations for Jones and Crain’s behavior. As both Brown and the Charging Party explained, conversations about these types of issues are routine. *Id.* at 324:19-24.

Brown happened upon Thomas at the Centrifuge Bar. After an exchange of pleasantries and small-talk, Mr. Brown described the incident between Mr. Crain and Ms. Jones. Mr. Brown asked the Charging Party for her take on the situation. *Id.* at 88:22-89:4. He sought to rule out possible explanations for the behavior. *Id.*

The Charging Party told Mr. Brown that there were a few reasons why a server may not have rung up the beer at that time. Exhibit 2 at 89:24-90:16. One of those reasons was the possibility that the server may have swiped the computer screen and the computer may have had an error, which would prevent a ticket from printing. *Id.* at 90:7-16. Mr. Brown replied to her that this could not have happened because he personally observed the entire transaction. *Id.* He told the Charging Party that he watched the entire series of events himself and the server never touched the screen. *Id.* at 20-25. Given those facts, the Charging Party could not offer any other plausible explanations. After additional discussion, the two parted ways. They did not discuss the issue again. *Id.* at 93:20-22.

Brown brought the matter to his manager and Human Resources, and Human Resources initiated an investigation.

1. The Charging Party Tries Contacting Lee Crain.

Later that night, the Charging Party began calling Mr. Crain on his cell phone. Exhibit 2 at 114:12-17. Mr. Crain received four or five calls from a number that he did not recognize, so he did not answer. *Id.* at 18-21. The caller did not leave a message. *Id.* at 24-25.

The next day, September 29, 2016 at 2:41 p.m., Mr. Crain started receiving texts from the same number. *See* Exhibit 3. The texts read “It’s Cynthia [sic] [right] away.” *Id.* Then, at 11:53 p.m., Mr. Crain received another that read “Hey It’s Cynthia can you call me[?]” *Id.* Both of these texts went unanswered. The next day, Charging Party continued texting Mr. Crain at 12:33 P.M.

and said “Lee. ... It’s Cynthia. Call me[.]” *Id.* Mr. Crain responded and said “Will do in a meeting[.]” *Id.* The Charging Party then texted “**Ok. It’s very important!! Claim U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for[.]**” *Id.* (emphasis added). The “meeting” that Mr. Crain was referring to was his due process meeting with Human Resources regarding the Ms. Jones incident. Exhibit 2 at 116:17.

Mr. Crain, as the recipient of this text, understood this text message to be a direction from the Charging Party to lie to Human Resources by claiming that the printer behind the bar failed to print. Exhibit 2 at 117:12-17. Mr. Crain understood the Charging Party’s text as directing him to “[f]abricate [his] story [by] ... saying something that didn’t happen.” *Id.* at 7-9.

Mr. Crain, however, did not comply with the Charging Party’s instruction. Exhibit 2 at 119:10-13. Indeed, it was Mr. Crain’s belief that if he followed the Charging Party’s instructions and told a fabricated story he would have been fired. *Id.* Instead, he brought the text messages to the attention of one of his Union’s shop stewards. This steward brought the matter to the attention of another steward, Randy West. Mr. Crain met with Mr. West and discussed their mutual concerns regarding the text messages. Exhibit 2 at 121:1-3. After that, they took the matter to general manager Dan Groesbeck. *Id.* Mr. Groesbeck forwarded this information to Human Resources who then began an investigation. Exhibit 2 at 122:1-15.

## 2. Human Resources’ Investigation and Recommendation.

Human Resources was made aware of the issue on October 1, 2016. Maureen Keefe-Wiseman, Employee Relations Business Partner, conducted the investigation. Exhibit 2 at 178:15. Ms. Keefe-Wiseman understood that Mr. Crain and Mr. West alleged that the Charging Party “was interfering in a Company investigation, potentially being untruthful ... which are terminable offenses on their own; [and] ... this is also consistent with her suspension from January of 2016

that resulted in a three-day suspension.” Exhibit 2 at 188:8-14. The Company placed the Charging Party on SPI on October 3, 2016. *Id.*

Based upon her review of the text messages and being the Human Resources officer that handled the Crain/Jones beer situation, Ms. Keefe-Wiseman reached the preliminary conclusion that the Charging Party was instructing Mr. Crain to be untruthful. Exhibit 2 at 192:20-193:10. This was based on the literal wording of the text and her knowledge of the Crain/Jones incident. No one involved in the Crain/Jones incident said that the printer failed. *Id.* Additionally, general manager Dan Groesbeck reviewed surveillance footage and indicated that the printer did not fail. *Id.* In sum, Ms. Keefe-Wiseman was aware of no information that could provide a reasonable explanation for the Charging Party’s text instructions other than to lie. *Id.*

On October 7, 2016, Ms. Keefe-Wiseman convened a due process meeting for the Charging Party. Exhibit 2 at 194:12-18. The meeting was attended by herself, shop steward Tamara Pastore, and Michelle Zornes, Executive Director of Beverage. *Id.* at 22-25. During the meeting, Ms. Keefe-Wiseman asked the Charging Party whether she recalled directing Mr. Crain to claim that he saw Ms. Jones attempt to enter the drink order into Infogenesis. Exhibit 2 at 195:15-21. The Charging Party responded that she recalled sending the text messages to Mr. Crain but she did not direct him to be dishonest. Exhibit 2 at 195:22-196:7; 198:25-199:1. Ms. Keefe-Wiseman also asked whether the Charging Party had a copy of the text messages. *Id.* at 199:4-10. The Charging Party claimed that she deleted them and said that she did not save a copy for herself. *Id.*

During the course of her discussion with the Charging Party, Ms. Keefe-Wiseman learned for the first time that the Charging Party discussed the Crain/Jones situation with Nathan Brown on September 28, 2016. Exhibit 2 at 202:23-203:5. When the Charging Party brought that conversation up, she said that Brown saw Jones on the computer but Crain gave Jones a beer even

though no beer had been rang in. Exhibit 2 at 203:15-17. However, Ms. Keefe-Wiseman said that did not make sense because “the whole reason this was sparked as an interview is because [Brown] specifically saw the bartender give out a drink that hadn’t been rung in. So that he didn’t see that.” Exhibit 2 at 203:22-204:1. To put it another way, if Brown had in fact seen Jones at the computer and then saw Crain give her a beer, he would have never spoken to Ms. Thomas. He wouldn’t have done anything all because that was not a departure from procedure. In other words, the Charging Party told Ms. Keefe-Wiseman that Brown saw Jones ringing in the beer, even though Brown saw and told the Charging Party the exact opposite.

As a result, Ms. Keefe-Wiseman spoke to Mr. Brown, obtaining both a summary of what he saw occur and a summary of his conversation with Ms. Thomas. He contradicted the Charging Party’s story, making it very clear that he had informed her that his suspicions were triggered by the fact that he had not seen Ms. Jones use the computer. Exhibit 2 at 204-205.

Next, Ms. Keefe-Wiseman called Fontay Jones on October 14, 2016. Exhibit 2 at 206:12-14. Ms. Keefe-Wiseman wanted to know if Ms. Jones advised the Charging Party that the printer did not work during the Crain/Jones beer incident. Exhibit 2 at 200:5-9. Ms. Keefe-Wiseman was trying to get to the bottom of these facts because “for all [she] knew, maybe Fontay called [the Charging Party] and said this is what [she thought] happened.” However, during their call Ms. Jones said that she had not spoken to the Charging Party at all. They had never spoken about the incident with Mr. Crain. Exhibit 2 at 206:5-11. At this point, there appeared to be no reasonable explanation for the Charging Party’s instruction other than to obstruct the Company. Thus, Ms. Keefe-Wiseman concluded that the Charging Party intended to interfere with an ongoing Company investigation. Exhibit 2 at 216:21-217:1. This violated multiple Company codes of ethics and conduct standards. Exhibit 2 at 218:13-221:4.

Ms. Keefe-Wiseman then presented her investigation and findings to the department leaders, Monica Dorsey and Michelle Zornes. Exhibit 2 at 216:6-16. Ms. Dorsey's consideration of the facts was thorough and thoughtful. *Id.* at 261-278. She considered the Charging Party's prior history, her live three day suspension,<sup>1</sup> the dishonesty inherent in that suspension, and the facts established by Ms. Keefe-Wiseman's investigation. She reviewed the text message, Mr. Crain and Mr. West's statements, and the explanation that the Charging Party provided during her due process meeting. She considered the context of the situation, including Ms. Thomas' decision to insert herself into a situation, Ms. Thomas' false account of her discussion with Mr. Brown, and the fact that Ms. Thomas never made any effort to verify the accuracy of her instruction to Mr. Crain to "claim" that he saw Ms. Jones enter the order into the computer. These acts violated

---

<sup>1</sup> At the time of these events, the Charging Party had an active disciplinary action for dishonesty. On January 8, 2016, the Charging Party worked off-the-clock for approximately 45 minutes at a service bar at MGM Grand and allowed her underage daughter to wait in the service bar, both of which are prohibited. Exhibit 2 at 263:5-8; 275:1-14. While these infractions were likely deserving of discipline on their own, the Charging Party compounded her offenses when she was dishonest during the Company's investigation. According to Monica Dorsey, Executive Director of Food and Beverage at MGM Grand, the Charging Party lied to the Company as to why and how long she worked off the clock. Exhibit 2 at 275:1-8. Specifically, the Charging Party said that she only worked off-the-clock for a short time to help a co-worker that did not know how to handle a transaction. *Id.* However, after additional investigation by the Company, MGM discovered that the Charging Party's explanation was false and she allowed her daughter behind the bar, which she omitted from telling the Company. *Id.* at 11-14. The Company also discovered that the Charging Party worked at another employee's station and collected that employee's gratuities, which Ms. Dorsey described as "literally taking money away from a co-worker working outside of her station." *Id.* at 22-23.

While Ms. Dorsey believed that the Charging Party's dishonesty in January 2016 warranted immediate termination, she decided to give the Charging Party a second chance based upon her length of service with the Company. Exhibit 2 at 251:19-252:3. She issued a three-day suspension instead on January 8, 2016. *Id.* at 255:16-20. The suspension put the Charging Party on specific notice that similar conduct would lead to termination. Dishonesty is called out in the notice. Pursuant to CBA § 18.04, disciplinary suspensions remain active in an employee's file for one year. Thus, according to the terms of the CBA the Charging Party's three-day suspension was still "live" when she interfered with the Company's investigation on or about September 29, 2016.

Article 18.01 of the CBA which establishes that “dishonesty” is a terminable offense.

**B. The Arbitrator’s Award**

On April 2, 2018, the arbitrator issued an award denying and dismissing the Charging Party’s grievance, finding that MGM “proved by clear and convincing evidence just cause for the October 18, 2016 discharge of Grievant Cynthia Thomas.” Exhibit 4 at p. 14. The arbitrator noted that the Charging Party “admit[ted] she sent the text message to Crain,” who “brought it to management’s attention because Grievant’s instructions were not factually accurate.” *Id.* at p. 16. Per Crain’s testimony, he “believed Grievant was telling him to lie during the investigation.” *Id.*

The Charging Party claimed that her text, as written, did not direct Crain to lie, and that she had not intended to do so. This argument was unsupported, and the arbitrator found that an “examination of the plain language in the text shows it is clearly written and extremely incriminating.” *Id.* In fact, the “Grievant was given ample opportunity to present a rational explanation for the explicit instructions conveyed to Crain in the message yet failed to do so.” *Id.*

The arbitrator was not persuaded by the Charging Party’s argument that the narrative contained in her text message was true based on her claim that “Brown told her Crain gave Jones the beer because Crain had seen Jones was on the computer and thought it had been rung up.” *Id.* at p. 17. The arbitrator found that Brown credibly testified to the exact opposite:

When Brown sought Grievant’s counsel as a Shop Steward he recalled engaging in a de-tailed discussion about the Crain/Jones incident. Brown told Grievant he witnessed Jones getting a beer from Crain without first ringing it up. Grievant played devil’s advocate, positing situations where a server might not ring up a drink order at the time the drink was delivered. Brown told Grievant that none of the possible scenarios she proposed had occurred. He specifically said he ended up ringing in the beer himself. Brown’s testimony during arbitration and his two statements to management were consistent with his explanation of what he witnessed with Crain/Jones and the content of his ensuing conversation with Grievant. [citations omitted]. Crain’s version of events corroborated

Brown's version. Crain did not see Jones at the computer and there was zero evidence the printer had been malfunctioning. [citations omitted]. Therefore, I find nothing in the record evidence to lead your Arbitrator to conclude Brown bore any animosity toward Grievant or that he had a motive to be untruthful during the investigation.

*Id.* at p. 17-18.

Further, the arbitrator placed particular emphasis on the Charging Party's testimony about why she deleted this incriminating text message, finding her explanation was not credible:

When pressed about when and why she deleted the text message her testimony vacillated from an assertion she always deletes text messages to free up phone memory space to claiming she only deleted unimportant messages. Her text message to Crain started, "OK, it's very important.!!"

*Id.* at p. 18 (emphasis in original).

While the Charging Party relied on medical conditions as "justification for an inability to fully or accurately remember certain key facts," the arbitrator noted that at the time of the subject events, she had been released to work without restrictions, and admitted that she had not taken any medication while at work, and was not impaired. *Id.* at p. 19. Further, her subsequent extensive efforts, including seeking extra work hours, engaging in a lengthy discussion with Brown, and making eight attempts to contact Crain over the next two days were "not consistent with that of someone who was overwhelmed by illness and impaired by medication[.]" *Id.* at p. 20.

Based on this evidence, the arbitrator concluded: "I hold the record evidence before me is consistent with a theory of guilt and inconsistent with any reasonable theory of innocence. Your Arbitrator concludes the Employer proved through clear and convincing evidence Grievant intended to instruct Crain to lie to management during a Company investigation meeting." *Id.* at p. 20. To that end, the Arbitrator found under Article 18.01(a) of the CBA that the Charging Party's blatant and dishonest interference with the investigation justified her "immediate discharge

for dishonesty.” *Id.* at p. 23-24; *see also* Exhibit 5. The CBA’s “clear and unambiguous” language “reflect[ed] the understanding that some incidents of misconduct are so severe that immediate discharge is appropriate.” *Id.*

## **II. ARGUMENT**

### **A. Summary Judgment Standard.**

Proceedings that allege an unfair labor practice, “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States.” 29 U.S.C. § 160(b). The NLRB often looks to the Federal Rules of Civil Procedure when deciding motions before it. *See, e.g., Yale University*, 330 NLRB 246, 246-47 (1999); *see* Fed. R. Civ. P. 56. In the absence of genuine issues of material fact requiring a hearing before an administrative law judge, summary judgment is appropriate. *Teamsters Local Union No. 579*, 350 NLRB 1166, 1168 (2007); *Marble Polishers Local 47-T* (Grazzini Bros.), 315 NLRB 520, 522 (1994).

### **B. Deferral to the Arbitrator’s Award Is Mandatory Pursuant to *Babcock*.**

The Board “will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.” *Babcock & Wilcox Constr. Co.*, 361 NLRB No. 132, 2014 NLRB LEXIS 964, \*20 (2014).

1. The Parties Explicitly Agreed that The Arbitrator Was Authorized to Decide the Statutory Issue.

As arbitration is a “consensual matter,” the Board “should not defer to an arbitrator’s decision unless the arbitrator was specifically authorized to decide the unfair labor practice issue.” *Babcock*, 2014 NLRB LEXIS 964 at \*22. Here, the parties specifically authorized the arbitrator

to decide the statutory issues, as memorialized in the Region's December 30, 2016 letter to the parties advising of the prearbitral deferral. This letter indicated: "Because **the parties have explicitly authorized the arbitrator to decide the statutory issues in this case**, the Board's deferral standards applicable in this case are those set forth in *Babcock*." Exhibit 6 at p. 3. (emphasis added). Thus, it cannot be disputed that the parties explicitly authorized the arbitrator to decide the statutory issues. Notably, the Region's correspondence further indicated that the "Charging Party may appeal [the] decision to defer this charge by filing an appeal." *Id.* The Charging Party did not file an appeal or otherwise refute the referenced agreement, further showing that the arbitrator was, in fact, authorized by the parties to decide the statutory issues.

2. The Union Acted Affirmatively to Prevent The Arbitrator from Being Presented With and Considering the Statutory Issues.

Deferral pursuant to *Babcock* additionally requires that "the arbitrator was presented with and considered the statutory issue, **or was prevented from doing so by the party opposing deferral.**" *Babcock*, 2014 NLRB LEXIS 964 at \*20. (emphasis added). Although the Union is not a party to this proceeding, it, as the charging party's representative, prevented the Arbitrator from considering the statutory issues in this case. On November 9, 2017, before the first day of hearing, MGM's counsel sent a request to Union counsel requesting that the statutory issues be submitted to the arbitrator. Exhibit 7. The Union refused to submit the statutory issues to the arbitrator, and, based on this refusal, the statement of issues each party submitted at arbitration did not include the statutory issue. Exhibit 4 at p. 2. The Union's refusal clearly prevented the arbitrator from being presented with and considering the statutory issue, satisfying *Babcock*'s second requirement for deferral.

3. The Arbitrator's Award Constitutes a Reasonable Application of Relevant Statutory Principles, and Thus Board Law Reasonably Permits the Award.

Deferral is appropriate “if the party urging deferral shows that Board law reasonably permits the arbitral award,” meaning that “the arbitrator’s decision must constitute a reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case.” *Babcock*, 2014 NLRB LEXIS 964 at \*\*33-34. The “arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act **could** reach.” *Id.* (emphasis added).

Though the arbitrator did not explicitly consider the statutory issues,<sup>2</sup> his analysis (wherein he found overwhelming evidence that MGM had a valid reason for discharging Thomas) is identical to the analysis the Board would perform if presented with the case. To demonstrate that an employee was disciplined for engaging in protected concerted activity under the Board’s *Wright Line* test, the General Counsel must first establish a *prima facie* case that the employee was subjected to an adverse employment action and that the employee’s protected conduct was a motivating factor. 251 NLRB 1083 (1980), *enfd. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). However, even if this *prima facie* case is established, the employer may nonetheless prevail if it can “produce evidence of a ‘good’ reason for the discharge.” *Id.* at 904-907.

---

<sup>2</sup> This, of course, does not preclude deferral, as *Babcock* specifically contemplates deferral may be proper where the arbitrator was prevented from considering the statutory issues. In fact, the Board specifically “decline[d] to adopt the General Counsel’s position that deferral is warranted only if the arbitrator ‘correctly enunciated the applicable statutory principles and applied them in deciding the issue.’” *Babcock*, 2014 NLRB LEXIS 964 at \*30.

First, as required by *Wright Line*, the arbitrator analyzed whether any protected conduct motivated adverse action taken against Thomas, finding as follows:

Your Arbitrator does not agree with the Union's assertion Grievant was punished for engaging in Shop Steward duties. This is not a case of an over zealous or vigorous Shop Steward advocating on behalf of a member. Protections for engaging in Union activities do not extend to an employee or Shop Steward who is dishonest during an employer investigation.

*Id.* at p. 24. The arbitrator's analysis and finding that dishonesty is not protected activity was similar, if not identical, to the analysis the Board would perform if presented with the case. *See Fresenius USA Mfg.*, 362 NLRB No. 130 (2015) ("false statements to [an] employer [are] not protected activity," and "dishonesty during the investigation . . . [is] not itself protected by the Act"); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 930 (1995) (activity that would ordinarily be protected under the Act may lose its protection if it "includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods"); *United Parcel Service of Ohio*, 305 NLRB 433 (1991) (upholding arbitrator's finding that Union steward terminated for making false statements on grievance report, lost protection of the Act because "false orchestrated statements" were deliberate and evidenced bad faith).

Even assuming for the sake of argument that the Charging Party established a *prima facie* case that her termination was motivated by her protected conduct (which is clearly not the case here), the Arbitrator's finding that MGM had a valid reason for discharge clearly satisfied *Wright Line*'s requirement that the employer provide "evidence of a 'good' reason for the discharge." 662 F.2d at 904-907. Where discharge is based on misconduct, the employer satisfies this if two elements are met: 1) "management reasonably believed those actions [constituting the misconduct] occurred," and 2) "the disciplinary actions taken were consistent with the company's policies and practice." *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (2012). The first element is solely

focused on the employer's reasonable belief, and if met, "then [the employer] could meet its burden under *Wright Line* regardless of what actually happened." *Id.*

As set forth above, the arbitrator engaged in a well-supported factual analysis of MGM's reasonable belief that Thomas had committed misconduct, including the plain language of the text message itself and the testimony of both Brown and Crain clearly showing that Thomas sought to falsify information related to an investigation. Exhibit 4 at p. 14-16. Even though the Charging Party's text message clearly showed she intended Crain to lie, the arbitrator carefully considered the Charging Party's exculpatory arguments. *Id.* at p. 16-20. The arbitrator found that her own contradictory and unbelievable testimony precluded any other explanation for her conduct. *Id.* Certainly, the arbitrator's analysis showed that MGM reasonably believed that misconduct was committed.

Next, the arbitrator specifically analyzed MGM's applicable policies and procedures, finding that MGM's termination of Thomas was consistent with these policies and supported by Article 18.01(a) of the CBA, which allows immediate discharge for such blatant acts of dishonesty. *Id.* This is the exact *Wright Line* analysis (as noted by *Sutter*) the Board would have performed if presented with the case. The General Counsel cannot reasonably claim that shop stewards are immune from discipline when they encourage employees to be dishonest, nor can the General Counsel claim that shop stewards cannot be held accountable for complying with the collective

bargaining agreement. Indeed, Board law is to the contrary.<sup>3</sup> See, e.g., *John Morrel & Co.*, 270 NLRB 1, 9 (1984) (“The importance of deferring to the “industrial common law... of the industry and the shop” created through the arbitration process cannot be overemphasized. In their many years of creating that “common law of the shop” arbitrators have recognized almost unanimously that stewards and other union officials have a higher duty than rank-and-file employees to adhere to the terms of a collective-bargaining agreement.”); *Consolidation Coal Co.*, 263 NLRB 1306, 1320-1321 (1982) (discussing no-strike clauses and quoting *United Parcel Service, Inc.*, 47 LA 1100--01 (1966)) (“If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer[.]”).

*Babcock* requires only that the arbitrator’s award be a decision that the Board *could* reach. It cannot be disputed that this requirement is satisfied here. *Babcock*, 2014 NLRB LEXIS 964 at \*\*33-34. The evidence of the Charging Party’s dishonesty was overwhelming. The arbitrator’s

---

<sup>3</sup> The Employer notes that Counsel for the General Counsel has suggested that the Arbitrator held the Charging Party to a higher standard because she was a shop steward. This is nonsense. The Charging Party already had a *live* three day suspension for dishonesty on her record at the time of her termination. She was not entitled to additional progressive discipline. Moreover, the Arbitrator’s determination was dictated by the terms of the collective bargaining agreement. Once he concluded that Thomas was dishonest, he was obligated to find that the Company met its burden of showing just cause because Article 18.01 specifically provides for discharge in such circumstances. There is no indication that the Charging Party’s status as a shop steward was considered an aggravating factor or was relevant to the severity of the discipline imposed. It was simply a fact, part of the record.

dismissal of the grievance was clearly the only reasonable decision. The Board would have reached the same result if presented with the case.

**C. If *Babcock* Does Not Mandate Deferral, The Board Should Reconsider Its Standard for Deferral and Return to the Traditional Standard Set Forth in *Spielberg/Olin*.**

As set forth above, the current case satisfies *Babcock*'s deferral requirements, and the Board should thus defer to the arbitrator's decision. However, if the Board applies *Babcock* and finds that deferral is not proper, MGM submits that there is defect in *Babcock* itself. Such a result would be contrary to the purpose of deferral, which is avoiding unnecessary and duplicative litigation of factual issues. Without reiterating facts set forth above, this case is the precise kind of case that should be disposed of via deferral. The Charging Party was terminated in 2016. The evidence of her dishonesty, including past discipline for dishonesty, warranted termination.

*Babcock*'s infirmities are set forth in detail in Members Miscimarra and Johnson's partial dissents to that decision. 361 NLRB No. 132, slip op. at 14-24. There is no reason to reiterate them here. As illustrated by this case, deferral has no meaningful purpose if it requires, rather than precludes, relitigation of allegations which were considered by the Arbitrator, including but not limited to allegations of unlawful animus. Accordingly, should the Board conclude that *Babcock* not permit deferral in this case, MGM requests that the Board reconsider that decision and return to the traditional standards set forth in *Speilberg/Olin*.

MGM recognizes that altering the standard set forth in *Babcock* is not undertaken lightly by the Board, and, should deferral be denied, requests leave to submit a separate briefing on the issue, and to allow (as the Board did prior to *Babcock*) interested parties to submit amicus briefs regarding this issue.

Dated this 15th day of January, 2019.

Respectfully submitted,  
JACKSON LEWIS P.C.

/s/ Paul T. Trimmer

Paul T. Trimmer  
3800 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169  
(702) 921-2460

*Counsel for Respondent MGM GRAND  
Hotel, LLC d/b/a MGM Grand Hotel and  
Casino*

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**CYNTHIA THOMAS**

**Case No. 28-CA-186022**

**and**

**MGM GRAND HOTEL, LLC D/B/A  
MGM GRAND HOTEL AND CASINO**

**CERTIFICATE OF SERVICE**

In addition to filing this **MOTION FOR SUMMARY JUDGMENT** in the above captioned matter with Region 28 via the NLRB's electronic filing system, we hereby certify that copies have been served this 15th day of January, 2019, by First Class Mail, upon:

Mr. Cornele A. Overstreet  
Regional Director  
National Labor Relations Board  
Region 28  
2600 N. Central Avenue, Suite 1400  
Phoenix, Arizona 85004-3019

\_\_\_\_\_  
/s/ Emily Santiago  
Emily Santiago

# EXHIBIT 1

# EXHIBIT 1

**DECLARATION OF PAUL T. TRIMMER IN SUPPORT  
OF MGM GRAND HOTEL, LLC D/B/A MGM GRAND HOTEL  
AND CASINO'S MOTION FOR SUMMARY JUDGMENT**

I, Paul T. Trimmer, declare and state as follows:

1. I am over the age of 18 and competent to testify. The following facts are based on my personal knowledge. If called as a witness, I am competent to testify as to these facts. I submit this declaration in support of MGM Grand Hotel, LLC d/b/a MGM Grand Hotel And Casino's ("MGM") Motion For Summary Judgment.

2. I am an attorney at Jackson Lewis P.C. in Las Vegas, Nevada. I currently represent MGM in this matter.

3. Attached hereto as Exhibit 2 is a true and correct copy of excerpt pages of the arbitration transcript of Cynthia Thomas' grievance which took place on November 14 and 30, 2017 before Arbitrator Gary L. Axon.

4. Attached hereto as Exhibit 3 are true and correct copies of the Employer's exhibits ("ERX") 3, 4, and 7 submitted at the arbitration of the Cynthia Thomas' grievance which took place on November 14 and 30, 2017 before Arbitrator Gary L. Axon.

5. Attached hereto as Exhibit 4 is a true and correct copy of Arbitrator Gary L. Axon's Award denying and dismissing the grievance of Cynthia Thomas issued on April 2, 2018

6. Attached hereto as Exhibit 5 is a true and correct copy of the Article 18 of the collective bargaining agreement between MGM and Culinary Workers Union, Local 226 and submitted at the grievance arbitration as Joint Exhibit 1.

7. Attached hereto as Exhibit 6 is a true and correct copy of a December 30, 2016 letter from National Labor Relations Board Region 28 to Cynthia Thomas and MGM advising of the decision on prearbitral deferral.

8. Attached hereto as Exhibit 7 is a true and correct copy of an e-mail exchange between the declarant and counsel for the Union on November 9, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 15th day of January, 2019.

/s/ Paul T. Trimmer\  
Paul T. Trimmer

# **EXHIBIT 2**

# **EXHIBIT 2**

# ORIGINAL

1

## ARBITRATION PROCEEDINGS

BEFORE ARBITRATOR GARY L. AXON

MGM Grand Hotel & Casino, )  
Employer, )  
and )  
Culinary Union, )  
Local 226, )  
Union. )  
IN RE TERMINATION OF: )  
Cynthia Thomas, Grievant. )

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Taken on Tuesday, November 14, 2017

At 10:44 a.m.

At MGM Grand Hotel & Casino

3799 Las Vegas Blvd.

Las Vegas, Nevada 89109

Reported by: JoAnn Melendez, CCR #370

1 A. About a year and five months now.

2 Q. So you started in last July?

3 A. In July.

4 Q. Okay. As the assistant beverage manager,  
5 what are your responsibilities?

6 A. Currently being to manage the casino  
7 floor and lounges.

8 Q. And you say currently. When did that  
9 change?

10 A. Around January.

11 Q. And what was the change?

12 A. Before that I was assistant manager -- or  
13 assistant beverage manager to the lounges.

14 Q. As the assistant beverage to the lounges,  
15 what were your responsibilities?

16 A. I helped manage the lounges.

17 Q. Okay. Before you worked at MGM where did  
18 you go?

19 A. Hilton Grand Vacation.

20 Q. And what was your job there?

21 A. Food and beverage supervisor.

22 Q. Did you -- as a food and beverage  
23 supervisor at Hilton Grand Vacations, what kind of  
24 employees did you supervise?

25 A. Those working in the cafe.

1 lounge by the handicap ramp.

2 Q. What's Centrifuge lounge?

3 A. It's one of the lounges located on the  
4 west end of the casino floor.

5 Q. And you said she was near the handicap  
6 ramp. What was she doing?

7 A. She was in a uniform from Brad Garrett  
8 and I believe she was speaking to some of the bar  
9 staff.

10 Q. You say in a uniform from Brad Garrett.  
11 What's Brad Garrett?

12 A. It's the lounge downstairs in the  
13 underground.

14 Q. Had you worked -- had you directly  
15 supervised Ms. Thomas at that time?

16 A. Yes.

17 Q. And had you supervised her prior to that  
18 since you started working at MGM in July?

19 A. Prior to July, no.

20 Q. Okay. Where did she work before Brad  
21 Garrett if you know?

22 A. I believe it was inside the Rouge Lounge.

23 Q. Did you supervise her there?

24 A. Yes.

25 Q. Okay. So you saw her wearing her Brad

1 process.

2 Q. Why did you raise those topics of  
3 conversation?

4 A. Because my previous shift earlier in the  
5 morning on Wednesday the 28th, I had an incident  
6 with a bartender and a cocktail server inside of  
7 Lobby Bar.

8 Q. Okay. I want to focus on that incident.  
9 What's Lobby Bar?

10 A. It's one of the lounges on the casino  
11 floor.

12 Q. And you supervised the employees there?

13 A. Correct.

14 Q. And you say you had an incident with a  
15 bartender and a cocktail server or a lounge server.  
16 Tell me what you saw.

17 A. As I was walking into the lounge from the  
18 casino floor, I noticed Fontay Jones walk up to the  
19 bar and ask Lee the bartender for a beer. I'm not  
20 sure what beer it was at this time, but he gave it  
21 to her without her touching the screen, ringing it  
22 in, printer being -- creating a receipt. She took  
23 the beer from the countertop and delivered it to the  
24 table behind her.

25 Q. So you saw this take place?

1 A. Correct.

2 Q. Okay. After you saw her deliver the beer  
3 to the customer's table, what did you do next?

4 A. As she was delivering the beer, I asked  
5 Lee where the receipt was. And he said he didn't  
6 have one and started searching his immediate work  
7 area.

8 Q. Was he able to locate one?

9 A. No.

10 Q. What did you do then?

11 A. When Fontay came back up to the bar, I  
12 asked her why she didn't ring in the receipt. Or,  
13 sorry, not the receipt, but the beer. And she  
14 thought that she had had, and I told her that I  
15 watched the entire process and she had not. And  
16 then I asked her to ring in the beer at that time.  
17 And she didn't want to because she thought she'd  
18 already rang it in. So on her next delivery, I rang  
19 in the beer for her.

20 Q. Okay. When we're talking about this  
21 ringing in the beer process, what does that involve?

22 A. It involves her taking her employee card,  
23 swiping the screen, pulling up the table on the  
24 InfoGenesis system which is our point of sale  
25 system, and then either printing out her receipt to

1 give to the guest or sending the beer to the  
2 bartender, so he can produce the drinks.

3 Q. Are there any rules or expectations that  
4 apply to cocktail servers, lounge servers with  
5 respect to ringing in alcoholic beverage items?

6 A. All drinks have to be rung in whether  
7 it's a -- given away as a comp or served to the  
8 guest either for them to pay for or as a spill, all  
9 drinks have to be rung in in the system for  
10 accountability purposes.

11 Q. After you finished this conversation with  
12 Fontay Jones and rang in the beer, what did you do  
13 then with respect to that particular incident?

14 A. I -- after that, after talking to her and  
15 Lee, I maybe went to the office and spoke to John  
16 Elliot who was an assistant beverage manager on duty  
17 at that time and informed him of what I had just  
18 witnessed inside the Lobby Bar. And he informed me  
19 that the employees could be placed on an SPI which  
20 is kind of taken out of the work place for  
21 investigation.

22 Q. At that time did you have any experience  
23 with placing employees on SPI?

24 A. Only -- no. Only from what I've heard  
25 other managers talking about in the office.

1 Q. Okay. Did this -- to the best of your  
2 recollection, did this email truly and accurately  
3 summarize what you saw occur on that night?

4 A. Yes, it is.

5 MR. TRIMMER: I ask that Employer's 2 be  
6 admitted.

7 MS. NIETO: No objection.

8 THE ARBITRATOR: Employer's 2 admitted.

9 BY MR. TRIMMER:

10 Q. Okay. So this is what you saw and you  
11 said that you were speaking to John Elliot and he  
12 suggested that these employees may end up being  
13 placed on suspension pending investigation?

14 A. Yes.

15 Q. And that was what was -- you said that  
16 was in the back of your mind when you were speaking  
17 to Ms. Thomas?

18 A. Correct.

19 Q. Okay. So let's go back to that  
20 conversation with Ms. Thomas. You bring up this SPI  
21 and the incident. Tell me what you said next.

22 A. Basically I asked her when shop stewards  
23 would be needed for SPIs, what their role was in the  
24 process and the disciplinary process again because I  
25 was only two months into the position. And that she

1 had mentioned to me that if we wanted disciplinary  
2 action to stick with an employee that we would need  
3 some managers in the office plus a shop steward plus  
4 the employee to review the information.

5 Q. Was there any discussion about the  
6 underlying incident? Did you describe what happened  
7 with Fontay and Lee?

8 A. Yes. I mean, after I asked her about  
9 that process, I told her that I witnessed the  
10 incident inside one of the lounges with the server  
11 asking for the beer and the bartender providing it  
12 and it wasn't rung in at any point.

13 Q. What did you say exactly if you can  
14 recall?

15 A. I did mention the employees' names, but I  
16 did say that I had witnessed the server come up to  
17 the bar and call for the beer from the bartender.  
18 He provided the beer to the server, she took the  
19 beer and served it to the table.

20 Q. Was there discussion about ringing it in?

21 A. I told her that I witnessed it not being  
22 rung in the entire time.

23 Q. Did she respond or say anything?

24 A. She did. She kind of played devil's  
25 advocate after I kind of brought that up saying that

1 there was some reasons that the server may not have  
2 rung up the beer at that time. One of them being to  
3 speed up service if they were busy and they wanted  
4 to get the beer out to the table, that they would  
5 take it to the table and ring it in later. She said  
6 she had personally done that herself a couple of  
7 times. Also they might have swiped the computer  
8 screen, the computer might have had an error and not  
9 send the beer to the printer, so a receipt might not  
10 have been printed out. However, as I was standing  
11 there, the screen was never touched or swiped. So  
12 there might have been a printer error with the  
13 printer itself or it didn't print out a receipt,  
14 maybe the bartender grabbed the receipt off the  
15 printer and threw it away, kind of glancing at it  
16 which didn't happen.

17 Q. So she raises these possibilities?

18 A. Correct.

19 Q. And what did you say in response?

20 A. I just basically said that none of those  
21 things could have possibly happened because I was  
22 standing there, the printer didn't printout a  
23 receipt, the screen wasn't swiped, nothing fell on  
24 the floor because I was there the entire time  
25 through the process.

4           A.     It is the summary of what conversation me  
5     and Cynthia had down in Centrifuge lounge.

8 A. Yes, it is.

11 MS. NIETO: No objection.

13 BY MR. TRIMMER:

19 A. No.

22                      A.                      No.

24 *///*

25 |||

## CROSS-EXAMINATION

BY MS. NIETO:

Q. Good afternoon, Mr. Brown.

A. Hello.

Q. I'm the Union attorney and I'll be asking you a few questions.

So is it your opinion that -- your opinion is -- what is your -- is it your opinion that not ringing in a drink is considered theft?

A. Well, all drinks have to be accounted for. So all drinks have to be rung in. Again, whether it's a spill, whether it's a comp, whether they didn't like it, what they're being charged for.

Q. Right. But my question is is not ringing in a drink considered theft?

A. It could be.

Q. Okay. Can you look at Company Exhibit 2 -- or Employer Exhibit 2 (sic). You sent -- this is your email. The first -- at the bottom, the bottom of the page one and then page two, this is an email from you to -- to I believe management, correct?

A. Michelle Zornes.

Q. Uh-huh. And other Company representatives, correct?

1 time that you were placed on SPI, do you recall  
2 having any conversations with Ms. Thomas?

3 A. No.

4 Q. Okay. Did you exchange text message with  
5 her --

6 A. No.

7 Q. -- prior to that time?

8 A. No.

9 Q. Okay. Did Ms. Thomas contact you  
10 regarding the incident with Fontay Jones?

11 A. She tried to, yes.

12 Q. Okay. Tell me how she first tried to.

13 A. Phone calls, I don't know who it was,  
14 phone calls the night of the SPI. I didn't answer.  
15 The morning after the SPI, didn't answer. And then  
16 text messages the day of the meeting. So I didn't  
17 respond to them until later.

18 Q. Okay. I want to focus on -- so she tried  
19 to call you by phone.

20 Do you recall how many times?

21 A. Probably about four or five times.

22 Q. And you didn't answer any of them?

23 A. No.

24 Q. Did she leave any messages?

25 A. No.

1 Q. Okay. I want to go to the -- a few lines  
2 down where it says Friday, 12:33 p.m.

3 Do you see that?

4 A. Yes.

5 Q. And there's a text message, Lee, it's  
6 Cynthia, call me.

7 Okay. Prior to that time, had you  
8 responded to any of her text messages?

9 A. No.

10 Q. And had you answered any of her phone  
11 calls?

12 A. No.

13 Q. Okay. At that point you respond and say  
14 will do, in a meeting?

15 A. (Positive nod of the head.)

16 Q. What meeting were you referring to?

17 A. That was my due process.

18 Q. Where were you sitting when you got this  
19 message?

20 A. In HR.

21 Q. In HR?

22 A. Uh-huh.

23 Q. Okay. And then there's a response here.  
24 It says okay. Do you see that?

25 A. Uh-huh.

1 Q. Where were you when you received that?

2 A. I was still in HR.

3 Q. Okay. And what did you understand this  
4 text message to mean when you received it?

5 A. This whole part afterwards?

6 Q. Yep.

7 A. Fabricating my story in which I didn't,  
8 you know, which -- saying something that didn't  
9 happen.

10 Q. And you say something that didn't happen.  
11 What is she saying that didn't happen?

12 A. Basically telling my manager or telling,  
13 you know, HR that the printer failed, you know, and  
14 that I -- and that I obviously gave her the beer  
15 that they asked for, which didn't happen. And, you  
16 know, I have nothing to -- I don't need to tell a  
17 story when the printer --

18 MS. NIETO: I would just like to object  
19 on the fact that he actually doesn't know what is  
20 actually the intention of the text.

21 THE WITNESS: I do have intention of the  
22 text.

23 MS. NIETO: He's giving his perception.

24 THE WITNESS: I'm not, no. That is not  
25 it. The intention -- it says right here claim you

1 computer related to that beer?

2 A. -- claim -- say that over. Sorry. Can  
3 you repeat that question?

4 Q. So you get this message that says claim  
5 you saw her enter stuff on the computer?

6 A. Uh-huh. Yeah, I didn't see that.

7 Q. Okay.

8 A. Yeah, I didn't -- I didn't see her ring  
9 in the beer. I didn't see her, so.

10 Q. So when you went into your due process  
11 interview, did you -- did you follow Ms. Thomas's  
12 instructions?

13 A. Absolutely not.

14 Q. Okay. And after the due process meeting  
15 was over, so, right, at some point did you contact  
16 your bartender?

17 A. Uh-huh.

18 Q. Did you contact someone in the  
19 Bartenders' Union about this text message?

20 A. I contacted Cathy, one of my shop steward  
21 bartenders, yes.

22 Q. And what did you tell her?

23 A. I let her know about this and I was a  
24 little irritated and she automatically contacted --  
25 gosh. My other shop steward.

1           A.     I let him know everything, you know, I  
2 showed him the text message and we took it to our  
3 general manager.

4           Q.     Who's that?

5           A.     Which is Dan Groesbeck?

6           Q.     G-r-o-e-s-b-e-c-k?

7           A.     Yes.

8           Q.     And what did you tell Dan?

9           A.     Well, actually Randy did most of the  
10 talking, but Randy had me show him the text message.  
11 So I sent him the text message and everything.

12          Q.     You sent him the text message that's  
13 here, Employer's 4?

14          A.     Yes.

15          Q.     Okay. And after that, so you told Mr.  
16 Groesbeck about what happened?

17          A.     Uh-huh.

18          Q.     You spoke to Mr. West. At some point did  
19 you speak to human resources again about the  
20 situation?

21          A.     Not until -- no. Not until afterwards.  
22 After Dan got ahold of it and forwarded everything.

23          Q.     So Dan gets ahold of it, the Company  
24 starts doing stuff?

25          A.     Right.

1 Q. And a few days later you speak to human  
2 resources?

3 A. Yes.

4 Q. Do you remember who you spoke to?

5 A. To Maureen.

6 Q. And what did you tell her?

7 A. I just explained the situation, explained  
8 the, you know, that -- about these messages. And,  
9 you know, I thought the rightful thing to do was to  
10 go to my managers and, you know, let them know  
11 because if I would have said this, I would have been  
12 fired. You know, and that's what Dan told me. He  
13 said if you would have said this, you would have  
14 been -- you fabricated a story, you would have been  
15 fired. I said absolutely.

16 Q. Did you --

17 A. That's why I'm bringing it forward.

18 Q. Did you complete a statement regarding  
19 what occurred?

20 A. I did.

21 Q. Okay. I'm gonna show you a document that  
22 will be marked as Employer's 5.

23 And while we're waiting, I ask that  
24 Employer's 4 be admitted.

25 MS. NIETO: No objection.

1 A. Labor relations partner.

2 Q. And what are your responsibilities?

3 A. I do only union related work. So if for  
4 contract, Article 2 meetings, restaurants open or  
5 close, and I did the liaison partner between company  
6 and the Union, grievances, arbitrations, ADRs.

7 Q. Okay. And is that the only role that  
8 you -- well, when did you begin that job?

9 A. May.

10 Q. Of 2017?

11 A. Yes.

12 Q. Where did you work before that?

13 A. I worked here at MGM.

14 Q. And what was your role at MGM Grand?

15 A. Employee relations business partner.

16 Q. HR business partner?

17 A. HR business partner.

18 Q. And how long were you an HR business  
19 partner at MGM Grand?

20 A. Three and a half years.

21 Q. So in October of 2016 you were employed  
22 by?

23 A. MGM Grand.

24 Q. And in January of 2016 you were employed  
25 by?

1 A. There could be multiple reasons. If  
2 maybe there's a safety concern, if it's potential  
3 theft any of the immediate terminable offenses.

4 Q. Now --

5 A. Is outlined in the CBA 18.01.

6 Q. Ms. Thomas was placed on SPI. Why was  
7 Ms. Thomas placed on SPI?

8 A. She was placed on SPI because there were  
9 allegations that she was interfering in a Company  
10 investigation, potentially being untruthful and --  
11 which are terminable offenses on their own; however,  
12 this is also consistent with her suspension from the  
13 January of 2016 that resulted in a three-day  
14 suspension.

15 Q. Now, you handled that case you said  
16 earlier?

17 A. Correct.

18 Q. In front of you is a document marked as  
19 Joint Exhibit 4.

20 A. Yes.

21 Q. In the first paragraph of that manager  
22 evaluation it cites Rule 28, dishonesty. Joint 4.

23 MS. NIETO: Oh.

24 THE WITNESS: Yes.

25 BY MR. TRIMMER:

1 Q. Okay. And is that the statement he gave  
2 to you?

3 A. Yes.

4 Q. And were any of the -- was that statement  
5 consistent with what he had said to you during the  
6 investigation?

7 A. Yes.

8 Q. And you heard him testify earlier today.  
9 Was his testimony today consistent with what he told  
10 you during the investigation?

11 A. Yes.

12 Q. Okay. So without burdening the record  
13 with that. So you'd spoke to Lee, you got a sense  
14 or you had an understanding now of what he had said,  
15 what he understood the text message and you also saw  
16 the text message yourself.

17 Having seen it and spoken to Lee at that  
18 point, what was your conclusion -- or your  
19 preliminary conclusion?

20 A. Preliminary conclusion is that the word  
21 claim in itself is her instructing him to be  
22 untruthful and interfering with an investigation.

23 Q. And you say "instructing him to be  
24 untruthful." In what sense was it untruthful?

25 A. Because not one single person in the

1 investigation at any point said this happened.

2 Q. Said what happened?

3 A. Fontay didn't indicate that the computer  
4 failed, Lee didn't indicate the computer failed, and  
5 Nathan the manager who witnessed the incident didn't  
6 indicate that it failed.

7 And John -- or Dan Groesbeck I believe it  
8 was that was also in surveillance indicated that  
9 when he reviewed surveillance it didn't indicate  
10 that the printer failed.

11 Q. Okay. After you interviewed Lee Crain  
12 and reviewed the text message, did you speak to Mr.  
13 West?

14 A. Yes.

15 Q. Okay. Did you obtain a statement from  
16 him?

17 A. Actually I don't know that I spoke to  
18 Randy West. I just saw his statement.

19 Q. Okay.

20 A. I don't think I met with him.

21 Q. Okay. Did you review his statement  
22 during your investigation?

23 A. I did.

24 Q. And that's the one that's in the record  
25 as Employer's Exhibit 6?

1 A. Yes.

2 Q. Okay. So you spoke to Lee, you got  
3 Randy's statement, you had Lee's statement, you  
4 reviewed them.

5 What did you do next?

6 A. Spoke to Fontay.

7 Q. Okay. And before you spoke to Fontay  
8 Jones, did you speak to anyone else?

9 A. Nathan.

10 Q. Okay.

11 A. I reviewed everything with Nathan Brown.

12 Q. And did you -- before we get into Nathan  
13 Brown, at some point did you speak to Cynthia  
14 Thomas?

15 A. Yes.

16 Q. Okay. When did you do that if you can  
17 recall?

18 A. On the 7th was her due process.

19 Q. Where did that take place?

20 A. In my office.

21 Q. Who else was there if you can remember?

22 A. Tanara Pastore who is another cocktail  
23 server shop steward and Michelle Zornes.

24 Q. Whose Michelle Zornes?

25 A. She's the director of beverage.

1 Q. Okay. And how did the due process  
2 interview begin?

3 A. Began the way it always does. Is anybody  
4 recording this, if you received an employee  
5 handbook, all the preliminary information, and then  
6 we roll into do you understand, do you know why  
7 you're here.

8 Q. And did you --

9 A. We talked about that.

10 Q. Did you talk about the text message  
11 that's marked as Employer's 4?

12 A. We did.

13 Q. Okay. And what did you say, if anything?  
14 How did the meeting begin?

15 A. I asked if she had any knowledge about  
16 the text message. I don't recall the exact order of  
17 things, but I know that I asked if she had -- I  
18 don't remember the exact line of questioning, but if  
19 she had any knowledge a text message to an employee  
20 indicating they should be dishonest in an  
21 investigation.

22 Q. Okay. And how did she respond to that  
23 question?

24 A. She said no, she hadn't instructed  
25 anybody to be dishonest. She did state that she had

1 sent a text to Lee Crain. She couldn't remember the  
2 exact content of it. She indicated that when I  
3 asked her what -- what did you mean, what were you  
4 telling him in the text, she indicated that she -- I  
5 don't remember the exact word she said now. That  
6 she was trying to help him think about what he did  
7 or -- I don't remember the exact words.

8 Q. Did you take any notes during this due  
9 process interview?

10 A. I did.

11 Q. I'm gonna show you a document that will  
12 be marked as Employer's Exhibit 10.

13 Do you think reviewing these notes would  
14 refresh your memory?

15 A. I do.

16 Q. Okay. Before we get into it, tell me  
17 what your process is for taking notes during a  
18 due-process meeting?

19 A. Umm.

20 Q. How do you take notes?

21 A. At the time I believe I typed these  
22 during the interview.

23 Q. Okay.

24 A. I haven't always done that, but towards  
25 the end of my tenure with MGM, I was typing as we

1 do those refresh your recollection as to what  
2 occurred during this -- the beginning portion of the  
3 due process interview?

4 A. It does.

5 Q. Okay. So how did the interview begin?

6 A. Again, it began by are you -- basically  
7 have you received your employee handbook, which is  
8 asking if you're aware of our policies and  
9 procedures. Then I asked her if she knew why she  
10 had been called down. She indicated the only thing  
11 she could figure was a meeting with HR. And then we  
12 indicated that it had been brought to our attention  
13 that she may have sent a text message to another  
14 employee indicating they should lie in a meeting.

15 Q. That word "lie," was that found in Lee's  
16 statement and Randy's statement?

17 A. I believe so. I'd have to confirm the  
18 statement, but yes, definitely in Lee's.

19 Q. Okay. And so you asked her if she had  
20 sent a text message to another employee indicating  
21 they should lie.

22 And what was her response based on -- to  
23 your recollection. And if you don't recall, based  
24 on the notes.

25 A. She said that she had sent Lee a text.

1 She never did say she was indicating he should lie.

2 Q. Okay.

3 A. But she did admit to sending him a text.

4 Q. Okay. Did you ask her if she had a copy  
5 of the text at that time?

6 A. I did.

7 Q. What did she say?

8 A. She said she did not.

9 Q. What was her explaining, if anything?

10 A. She said she didn't save it.

11 Q. She didn't save it. And did you ask her  
12 what her intent was in sending the text message to  
13 Lee?

14 A. Yes.

15 Q. And what did she say?

16 A. Her response was just tell him he needs  
17 to think through what his process was. At no point  
18 would I ever tell anybody to lie or to not tell the  
19 truth.

20 Q. That's -- you just read a portion of your  
21 notes down here the bottom of the second page?

22 A. Correct.

23 Q. Is that to your recollection what she  
24 said?

25 A. Yep. Yes.

1 Q. Okay. The next question here is were you  
2 in contact with Fontay?

3 A. Yes.

4 Q. Why did you ask that question?

5 A. I asked her that because I'm -- I was  
6 trying to understand if there was a reason why she  
7 would tell that to Lee. For all I knew, maybe  
8 Fontay had called her and said this is what I think  
9 happened.

10 Q. And what was her response?

11 A. No, that she had not spoken to Fontay.

12 Q. Okay. And she said that she was telling  
13 him he needs to think through what his process was.

14 What was your conclusion about that? Did  
15 you believe that that was a reasonable thing for her  
16 to say based on what you had reviewed?

17 A. It didn't make any sense.

18 Q. Why not?

19 A. Because again, nobody so far that I had  
20 spoken to in the investigation indicated that there  
21 was a printer failure.

22 Q. Okay. Now, at that point you had  
23 interviewed Ms. Thomas, do you recall anything else  
24 relevant about that conversation?

25 A. Yeah.

1 Q. So having spoken -- well, having  
2 interviewed Ms. Thomas, what, if anything, remained  
3 to be completed with respect to the investigation?

4 A. I did speak to Fontay and confirm that  
5 she had not reached out to Cynthia.

6 Q. Uh-huh. And did you speak to anyone  
7 else?

8 A. I spoke to -- I spoke to Lee, I spoke to  
9 Cynthia, I spoke to Fontay, I spoke to Nathan, and  
10 then I confirmed with the department.

11 Q. Okay. Now, in front of you is a document  
12 that's marked as Employer's Exhibit -- I think it's  
13 3. It's Nathan Brown's email.

14 A. Yes.

15 Q. From October 11th.

16 A. Correct.

17 Q. Okay. And I also see on Employer's  
18 Exhibit 7 it says that you interviewed Mr. Brown on  
19 that date?

20 A. Yes.

21 Q. Okay. What was the reason why you  
22 interviewed Mr. Brown?

23 A. I was not aware that Cynthia and Nathan  
24 had had a conversation at all in the course of the  
25 investigation of the Lee Crain, Fontay Jones

1 situation.

2 So during Cynthia's due process when she  
3 brought up having had a conversation with Nathan, we  
4 circled back with Nathan to understand his side of  
5 that conversation.

6 Q. And according to your notes on the second  
7 page, it says that Cynthia Thomas told you that  
8 Nathan said Lee gave Fontay a beer because she was  
9 on the computer and Lee thought she rang it in.  
10 That was Ms. Thomas's statement during your due  
11 process interview?

12 A. I'm sorry. Where are you reading from?

13 Q. On the second page at the fourth entry  
14 down.

15 A. Yeah. The manager said Lee gave Fontay a  
16 beer because she was on a computer and Lee thought  
17 she rang it in.

18 Q. Okay. So you interviewed Nathan about  
19 that?

20 A. Correct.

21 Q. What did Nathan say?

22 A. Nathan -- the whole reason this was  
23 sparked as an interview is because he specifically  
24 did not see the server ring it in and specifically  
25 saw the bartender give out a drink that hadn't been

1       rung in. So that he didn't see that.

2           Q.       And with -- in interviewing Mr. Brown,  
3       was there any further discussion about his  
4       conversation with Cynthia Thomas?

5           A.       He indicated that he didn't give  
6       specifics about who the scenario he was talking  
7       about. He indicated he was doing rounds, he sees  
8       Cynthia as he's doing rounds. Obviously he wouldn't  
9       look for her in a bar that she was not scheduled to  
10      work in and was not near the bar she was scheduled  
11      to work in. Happened upon her, said hey, asked a  
12      few questions about what a shop stewards duties are.  
13      He was new to casinos, new to -- I don't believe  
14      he's ever managed union employees or worked for the  
15      CBA before either.

16          Q.       Uh-huh.

17          A.       And was just trying to get an  
18      understanding of processes. I think he indicated he  
19      had questions of whether or not a shop steward had  
20      to be present during an SPI.

21          Q.       And was -- did he describe what he told  
22      her about the situation that he witnessed?

23                  Well, maybe a better question is did he  
24      give you a statement that described what occurred?

25          A.       Yes. He did provide me with a statement.

1 I don't remember the conversation, but I do know  
2 that he provided us with this statement.

3 Q. Okay. And is that the October 11th  
4 statement?

5 A. Yes.

6 Q. Okay. So now you've spoken to Mr. Brown.  
7 And had your conversation with Mr. Brown changed  
8 your opinion as to whether or not Ms. Thomas at that  
9 point had told Lee to be untruthful?

10 A. Well, yes in the sense that it confirmed  
11 again nobody -- nobody alleged to seeing the server  
12 ring the drink in.

13 Now, the server indicated that she felt  
14 the drink had been rung in, but prior to her  
15 delivering the last round of drinks, not upon  
16 receiving the drink itself.

17 Q. After you spoke to Mr. Brown, who did you  
18 speak to next?

19 A. Fontay.

20 Q. And where did that interview take place?

21 A. That was a phone conversation.

22 Q. And do you recall if anyone else was on  
23 the phone when you spoke to her?

24 A. I don't remember.

25 Q. What did she tell you?

1           A.     I think I had her on speaker phone with  
2 maybe Leslie, someone from the department. I think  
3 I had her on speaker phone.

4           Q.     And what did she say?

5           A.     She -- I just asked her if she had  
6 reached out to Cynthia regarding an incident with  
7 her and Lee and she said that she had not. Without  
8 actually having to prompt her, she indicated that in  
9 a nutshell she didn't feel that Cynthia was  
10 effective as a shop steward and would not have  
11 reached out to her.

12          Q.     That interview occurred when, if you  
13 recall?

14          A.     The 14th. The 14th.

15          Q.     And am I on 11?

16                 THE ARBITRATOR: Yes.

17                 MS. NIETO: Yes.

18 BY MR. TRIMMER:

19          Q.     I'm gonna show you a document that will  
20 be marked as Employer's Exhibit 11.

21                 Do you recognize this page of notes?

22          A.     I do.

23          Q.     What are they?

24          A.     It is my handwriting of a Fontay Jones'  
25 phone call on October 4th.

1 THE ARBITRATOR: All right. And that  
2 was?

3 MS. NIETO: Exhibit 12.

4 THE ARBITRATOR: Exhibit 12.

5 BY MR. TRIMMER:

6 Q. Okay. Having reviewed, completed your  
7 investigation, you say that you prepared -- you sort  
8 of summarized that investigation and presented it to  
9 the department?

10 A. Correct.

11 Q. And who in the department would you have  
12 presented that to or did you present it to?

13 A. Michelle Zornes and Monica Dorsey.

14 Q. Who's Monica Dorsey?

15 A. She's food and beverage. She's our  
16 executive director of food and beverage.

17 Q. Okay. And at the time that you were  
18 presenting this, your findings to the department to  
19 collaborate with them about a decision, I have a  
20 couple of questions.

21 First, did you come to any conclusion as  
22 to whether or not -- come to any conclusion about  
23 whether Ms. Thomas's text message to Lee Crain  
24 violated any rules of conduct?

25 A. Yes. It was concluded that she was

1 interfering in an ongoing Company investigation.

2 Q. And did -- and in addition to that  
3 interference, was there any other problem with the  
4 statement?

5 A. Yes.

6 Q. Why was it interfering?

7 A. She -- she stated to the employee that he  
8 should be dishonest based on the word claim which in  
9 itself means claim. Say this is what happened when  
10 that was not what happened by anybody's account.

11 Q. I'm gonna give to you a -- does the  
12 Company maintain rules of conduct?

13 A. Yes.

14 Q. Does the Company also maintain a code of  
15 ethics?

16 A. Yes.

17 Q. A code of conduct. I'm gonna show you a  
18 collection of documents that will be marked as  
19 Employer's Exhibit 12.

20 THE ARBITRATOR: 13.

21 THE WITNESS: Yes. We just pulled 12  
22 back.

23 MS. NIETO: We just pulled 12 back.

24 THE ARBITRATOR: I know, but we had  
25 argument about it. So the record is that 12 was

1 withdrawn.

2 MS. NIETO: I see. I see. So we'll  
3 continue.

4 BY MR. TRIMMER:

5 Q. I'll represent that this is an excerpt  
6 from the MGM handbook that was in effect at the  
7 time.

8 Maureen, first, looking at the second  
9 page of this exhibit, it says code of conduct, and  
10 in the upper right-hand corner it says page 35.

11 Do you see that?

12 A. Yes.

13 Q. Okay. Which portion of the code of  
14 conduct -- well, can you turn to page 37. It says  
15 cooperation.

16 A. Yes.

17 Q. And did you come to any conclusion as to  
18 whether or not Ms. Thomas's conduct had violated  
19 that portion of the code of conduct?

20 A. Yes.

21 Q. And how -- what was your conclusion?

22 MS. NIETO: Counsel, could you tell me  
23 which number we're looking at right now?

24 MR. TRIMMER: 37. Page 37, No. 15,  
25 cooperation.

1 MS. NIETO: I'm sorry. No. 15,  
2 cooperation?

3 MR. TRIMMER: Uh-huh.

4 MS. NIETO: I object to the discussion of  
5 this. This wasn't on a separation PAN. It wasn't  
6 one of the reasons for her termination.

7 THE WITNESS: This was the --

8 MS. NIETO: If you look at Company  
9 Exhibit -- sorry. Or joint exhibit actually. Joint  
10 Exhibit 5. Yeah, Joint Exhibit 5, it does not list  
11 No. 15 as the reason for her termination.

12 MR. TRIMMER: I direct your attention to  
13 the bottom four lines of the PAN that says failure  
14 to comply with the MGM Resorts International Code of  
15 Business Conduct, Ethics and Conflict of Interest  
16 Policy.

17 MS. NIETO: But that's under 39.

18 MR. TRIMMER: Rule 39 which is included  
19 in this excerpt.

20 MS. NIETO: It says failure to comply  
21 with the MGM Resorts International Code of Business  
22 Conduct, Ethics and Conflict of Interest Policy.

23 MR. TRIMMER: That's right.

24 MS. NIETO: Okay. Withdrawn objection.

25 THE ARBITRATOR: Okay.

1 MR. TRIMMER: Thank you.

2 BY MR. TRIMMER:

3 Q. So turning back to page 37, No. 15,  
4 cooperation, on what basis did you draw -- come to  
5 the conclusion that Ms. Thomas had violated the  
6 cooperation provision?

7 A. We expect you to cooperate fully and  
8 truthfully with any internal investigation or audit  
9 and respect the confidentiality of the process.

10 Q. Okay. And --

11 A. Communicate relevant information.

12 Q. And turning to the next page of the  
13 exhibit, what rules of conduct would you come to the  
14 conclusion that Ms. Thomas may have violated?

15 A. 21, failure to cooperate during or  
16 interfering with Company investigation, refusing to  
17 cooperate with, provide information or identify  
18 yourself to management, security or a guest.

19 Number 28, dishonesty.

20 And you guys don't need me to read the  
21 whole thing, do you?

22 THE ARBITRATOR: No.

23 MR. TRIMMER: No.

24 MS. NIETO: Which other one did you say?

25 23.

1 THE WITNESS: 28. And then just going  
2 back to page 35, just a number one of code of  
3 conduct, the second bullet point says be truthful,  
4 fair and ethical.

5 BY MR. TRIMMER:

6 Q. Oh, right. Thank you.

7 MS. NIETO: 25 what?

8 THE WITNESS: On page 35, number one,  
9 second bullet point, second page. Number one down  
10 on the left column, second bullet point, be  
11 truthful, fair and ethical.

12 BY MR. TRIMMER:

13 Q. And these are the -- this is the code of  
14 conduct and the rules of conduct that were in effect  
15 at the time?

16 A. Correct.

17 MR. TRIMMER: I ask that Employer's 13 be  
18 admitted.

19 MS. NIETO: No objection.

20 THE ARBITRATOR: Employer 13's admitted.

21 BY MR. TRIMMER:

22 Q. Does the Company maintain records as to  
23 whether employees have received the employee  
24 handbook?

25 A. Yes.

1 date of hire. It says March 22nd, 2015.

2 A. Oh, yes.

3 Q. Is that incorrect?

4 A. That is incorrect.

5 Q. What is the correct date?

6 A. I believe Ms. Thomas worked for us for 13  
7 years. So it would have been I believe --

8 Q. 2005?

9 A. Yeah.

10 Q. Okay.

11 A. 12 years then I guess.

12 Q. So then it's correct to say that this  
13 should read March 22nd, 2005, is that correct?

14 A. I believe so, yeah. I'd have to verify  
15 her date of hire, but I think that's accurate.

16 Q. Okay. And I just want to verify her  
17 classification as cocktail server, is that correct?

18 A. Cocktail server at the lounge.

19 Q. Okay. So it says cocktail server,  
20 lounge. That's a dual classification, correct?

21 A. Well, I -- Cynthia's indicating it's a  
22 dual classification, so we --

23 Q. Can you explain what that means?

24 A. Well, we -- a couple years ago, we had  
25 just cocktail servers. And you may work in the

1 A. Umm --

2 Q. No?

3 A. No.

4 Q. Okay.

5 A. It was never mentioned.

6 Q. Okay.

7 A. It was mentioned in the board. It was  
8 never brought up in the investigation.

9 Q. But you never considered it at -- when  
10 you were reviewing the text message, that was never  
11 a consideration?

12 A. It was never brought up by Ms. Thomas,  
13 no, that her phone may have auto corrected  
14 something.

15 Q. But you never -- okay. So she never  
16 brought it up, but you never on your own brought it  
17 up?

18 A. No. It wasn't anything I thought to ask.

19 Q. Okay. What other factors did you  
20 consider? Did you consider her length of time with  
21 the Company?

22 A. Yes. And that's why she didn't get  
23 terminated in January when she had gross misconduct  
24 on so many levels with the three-day suspension.

25 Q. Uh-huh.

1           A.     The reason she wasn't terminated then was  
2 her tenure. The Company decided to give her another  
3 opportunity.

4           Q.     Do you know if Ms. Thomas had ever  
5 received any sort of awards or recognitions?

6           A.     She may have had some guest letters.  
7 That's nothing that would have come to me.

8           Q.     Okay.

9           A.     In my capacity.

10          Q.     So you weren't aware of that?

11          A.     I know that when I presented her file for  
12 these proceedings that there were a couple of  
13 historical ones that printed out.

14          Q.     Okay. And you know Ms. Thomas from  
15 working at MGM, correct?

16          A.     Correct.

17          Q.     Did you know her well?

18          A.     Just through work again. She was a shop  
19 steward so I did see her more often than most  
20 employees you do in the capacity of --

21          Q.     Right.

22          A.     -- employee relations and labor  
23 relations, you do spend more time with the shop  
24 stewards than other employees.

25          Q.     Okay. Was she a good worker?

1 4 for instance. Like I want to know when it was  
2 produced to --

3 THE WITNESS: It was produced to the  
4 Union as documentation requested for the board of  
5 adjustment.

6 BY MS. NIETO:

7 Q. Okay. So it was presented to the board  
8 of adjustment?

9 A. It was not provided to the employee prior  
10 to the termination.

11 Q. Okay. That's all I wanted clarification  
12 for.

13 A. But again, when I asked her about the  
14 text, she could speak to it. So she knew what I was  
15 talking about.

16 Q. Right. I'm just simply wondering when  
17 the text was actually produced. I want to just go  
18 back to you said that you also participated in the  
19 due process related to Ms. Thomas's discipline for  
20 the incident on January 8th, 2016?

21 A. Yes.

22 Q. And so if you look at Joint Exhibit --  
23 Joint Exhibit 2 which is the grievance for the  
24 January -- for the January 8th issue. I mean  
25 incident.

1           A.     I'm going to have to refer to my notes,  
2 but I know she didn't provide one.

3           Q.     Okay.

4           A.     10.

5           MS. NIETO: Yeah, I believe it's 10.

6           THE WITNESS: Yeah, I didn't put notes to  
7 it, but it is part of our standard form that we ask.  
8 If you haven't already done so, bring -- if you  
9 haven't already brought a statement with you, would  
10 you please provide one.

11           So I don't recall her exact response, but  
12 she did not provide one.

13           MR. TRIMMER: Okay. No further  
14 questions. Thank you.

15           THE ARBITRATOR: All right. Thank you.  
16 Let's go off the record for a minute.

17           (Whereupon, an off-the-record discussion  
18 was had.)

19           (Whereupon, Monica Dorsey was duly sworn  
20 to tell the truth, the whole truth, and  
21 nothing but the truth.)

22                         DIRECT EXAMINATION

23           BY MR. TRIMMER:

24           Q.     Ms. Dorsey, are you currently employed?

25           A.     Yes.

1 Q. By whom?

2 A. MGM Grand.

3 Q. And what's your current position?

4 A. Executive director of food and beverage.

5 Q. And how long have you held that job?

6 A. December will be four years.

7 Q. And as the executive director of food and  
8 beverage, what are your responsibilities?

9 A. I oversee the entire division, the  
10 Company goals and expectations and ensure they're  
11 being disseminated down to the rest of the  
12 employees, and I oversee approximately 2,500  
13 employees and 240 managers.

14 Q. Do you become involved from time to time  
15 in disciplinary issues?

16 A. Yes.

17 Q. When do you typically become involved in  
18 disciplinary issues?

19 A. When they get to a point where they're at  
20 suspension level and possible termination.

21 Q. And why do you become personally involved  
22 at that time?

23 A. To ensure that we're being consistent and  
24 that I have information on all the situations that  
25 are being investigated to make sure that it's fair

1 and equal.

2 Q. Now, were you involved in making the  
3 decision to terminate Ms. Thomas?

4 A. Yes.

5 Q. Okay. And were you also involved in the  
6 decision-making process for her three-day suspension  
7 in January 2016?

8 A. Yes.

9 Q. Okay. And with respect to the  
10 termination, what was your involvement?

11 A. I received information from -- originally  
12 from the department. Got an email from Dan  
13 Groesbeck regarding the text message. I forwarded  
14 that off to HR and they're in the middle of  
15 investigating the SPI.

16 Q. So you were involved on the front end  
17 when Dan Groesbeck found out about the situation?

18 A. Yeah.

19 Q. And then did you become involved again at  
20 the end?

21 A. Yes.

22 Q. So focusing on the end, what did you do  
23 or what was your -- what was your process? And then  
24 we'll get into the rest of it.

25 A. Okay. So I reviewed -- after the due

1 process was completed, I reviewed with Mo the  
2 details of the case. I actually saw the statement  
3 from Randy West and from Lee Crain. I saw Mo's  
4 summary of all of her witnesses and how she  
5 interviewed everyone and took that information,  
6 discussed it with the department which would be  
7 Michelle, discussed it with Mo, and then discussed  
8 it with my vice president.

9 Q. Did you review the text message itself?

10 A. I did.

11 Q. And I guess when you say the witnesses,  
12 so you considered what Fontay Jones said?

13 A. Yes.

14 Q. Who else -- did you consider what Ms.  
15 Thomas said?

16 A. Yes. I did consider that. She didn't  
17 have a whole lot from the summary notes that Mo gave  
18 me. She didn't provide a lot of information.

19 Q. Okay. Now, in front of you is a document  
20 marked as Joint Exhibit 5.

21 A. Is everything over here?

22 MS. KEEFE-WISEMAN: Joint's on your left.

23 BY MR. TRIMMER:

24 Q. It's the separation PAN. Okay. Are you  
25 familiar with this document?

1 A. Yes.

2 Q. Now, it's signed by Michelle Zornes.  
3 Who's that?

4 A. She's the director of beverage.

5 Q. Okay. But you're responsible for making  
6 this decision in collaboration with HR?

7 A. Yes.

8 Q. I'm gonna walk through this document and  
9 how you came to your conclusions.

10 First, at the beginning it says, She's  
11 being separated from the Company in accordance with  
12 Article 18 and 18.01 of the CBA for progressive  
13 discipline.

14 A. Uh-huh.

15 Q. In front of you is the Collective  
16 Bargaining Agreement. Can you turn to 33.

17 A. Uh-huh.

18 Q. Are you there?

19 A. Yes.

20 Q. Okay. So this says terminating reason  
21 for violation of GRC No. 28, dishonesty.

22 Do you have experience with the  
23 Collective Bargaining Agreement that applies to  
24 culinary and bartender employees?

25 A. Yes.

1 Q. Okay. Does Article 18.01(a) contain any  
2 provisions which relate to dishonesty?

3 A. Yes.

4 Q. And where is that?

5 A. Right here where it says immediate  
6 suspension or discharge for dishonesty, misconduct,  
7 incompetence, insubordination.

8 Q. And I also see before that it talks about  
9 the system of progressive discipline.

10 Do you see that?

11 A. No, I cannot. Yes, I do.

12 Q. Okay. It says, Within the principle of  
13 progressive discipline, the employer may impose  
14 immediate suspension or discharge for dishonesty,  
15 incompetence and misconduct.

16 A. Uh-huh.

17 Q. Is that consistent with how you've  
18 applied this to other employees within the  
19 bargaining unit?

20 A. Yes.

21 Q. Okay. And I want to focus back on  
22 Cynthia Thomas and 18.01(a). What provision of  
23 18.01(a) or what prohibition in 18.01(a) did Ms.  
24 Thomas violate when she sent her text message to Lee  
25 Crain?

1 A. Misconduct.

2 Q. Anything else?

3 A. Dishonesty.

4 Q. And how was she dishonest and how did she  
5 engage in misconduct when she sent the text message  
6 to Mr. Crain?

7 A. I believe that I reviewed that  
8 information. And when I read the text, it implied  
9 to when you say claim, that -- that said to me that  
10 she was making the statement, make a claim that  
11 something happened that didn't occur. That's when I  
12 read it, that's what I thought when I went back and  
13 reviewed the statement from Lee Crain himself and  
14 with Randy, they felt the exact same way. I had the  
15 same impression, Mo had the same impression.

16 And when Cynthia Thomas was asked, she  
17 didn't really have an answer other than she didn't  
18 really remember, could there have been -- you know,  
19 she just really couldn't remember, didn't have much  
20 to say about it because I was interested in what --  
21 what her response was to this text message. Didn't  
22 really have one.

23 Q. And according to Mo's notes and her  
24 test -- what Mo just said, she said that Ms. Thomas  
25 claimed that she was telling Mr. Crain to think

1 about his process.

2 Did you consider that?

3 A. I did consider that. To me that didn't  
4 make sense because she had never spoke to Lee Crain,  
5 she never spoke to Fontay.

6 Originally I assumed that she was maybe  
7 trying to protect Fontay because it looked like  
8 there was maybe theft going on between the bartender  
9 and cocktail server. That's what I originally  
10 thought when I read that.

11 Q. Why did it matter to you that she hadn't  
12 spoken to Lee and hadn't spoken to Fontay before she  
13 sent that text message?

14 A. Because she didn't ascertain any of the  
15 details. She had no idea what was going on. What  
16 also made this egregious to me was that she inserted  
17 herself. She is a shop steward for the Culinary  
18 Union, not for the Bartenders' Union. No one asked  
19 her to get involved and she began making phone calls  
20 and then sending text messages. I found that very  
21 odd and it didn't make any sense to me.

22 Q. Did you consider what Nathan Brown said  
23 about his conversation with Cynthia Thomas?

24 A. Yes. In fact, she knew for a fact that  
25 nothing had been entered into the computer because

1 he had already told her that Fontay said that she  
2 wasn't going to, she refused to do it, and that  
3 Nathan Brown himself actually entered the beer into  
4 the system.

5 So at that point in time, she had enough  
6 information to know that this right here was not  
7 you. (Gesturing.)

8 Q. When you say "this here," what are you  
9 pointing at?

10 A. The text message that she sent saying,  
11 claim you saw her entering stuff on the computer and  
12 you figured the printer failed so you gave her the  
13 beer she asked for.

14 Q. Why did you believe -- or why did you  
15 conclude that sending that text message to Lee  
16 Crain, telling him to say something that was false  
17 constituted misconduct and was dishonest?

18 A. Because there were investigating the  
19 situation. The Company was investigating and she  
20 inserted herself into it and asked somebody to be  
21 dishonest during that investigation. That was very  
22 severe to me.

23 Q. Had you been involved in terminating  
24 other employees besides Ms. Thomas for giving false  
25 statements during investigations?

1           A.     I would have to go through my archives  
2 and think if that they did, then --

3           Q.     Clayton Simmons?

4           A.     Clayton Simmons, yes. Actually, yes.

5           Q.     And was Clayton Simmons, what kind of  
6 employee was he?

7           A.     He was a --

8           Q.     What classification?

9           A.     Oh, he was a -- he was an order taker in  
10 in-room dining.

11          Q.     And was he terminated -- was he  
12 terminated for giving false statements during the  
13 investigation?

14          A.     Yes. Yes, he was.

15          Q.     And was he given progressive discipline  
16 for making those false statements?

17          A.     He did have some progressive discipline.  
18 I'd have to go back and look at all of that.

19          Q.     He had a five-day suspension?

20          A.     Yeah, he had a five-day suspension.

21          Q.     So that's the Collective Bargaining  
22 Agreement. The next reference in the termination  
23 document is to rule of conduct number 28,  
24 dishonesty. And the pertinent provision of that  
25 rule is included in the termination notice.

1 A. Uh-huh.

2 Q. How was Ms. Thomas not forthcoming and  
3 honest in communications connected to  
4 investigations?

5 A. Because again, she is asking someone to  
6 claim something occurred that didn't occur during  
7 that investigation, that this right here is a  
8 blatant disregard for the truth and she was  
9 interfering in the investigation to the point that  
10 had Lee Crain followed this directive from a shop  
11 steward, he may have been separated from the Company  
12 as well.

13 Q. Well, explain that.

14 A. If he would have been -- if we would have  
15 found him lying in the investigation, if he would  
16 have made the claim that he did see Fontay ring it  
17 up and there must have been some sort of printer  
18 failure and we through the investigation found that  
19 not to be true, he could have been separated from  
20 the Company.

21 Q. In fact, there was a lot of evidence that  
22 he hadn't seen anything entered into the computer at  
23 that point, right?

24 A. Correct. He said he didn't, Fontay said  
25 she didn't do it, the manager Nathan said that he

1 did do it. All of this information was already in  
2 place, so.

3 Q. The next rule that's referenced is  
4 failing to cooperate during or interference with a  
5 Company investigation.

6 How did Ms. Thomas violate that rule?

7 A. Again, she didn't do her due diligence.  
8 She was going to be the shop steward, she should  
9 have spoken to Fontay, got the information that  
10 she -- that happened from her perspective, she  
11 should have spoken to Lee Crain, she could have at  
12 any time spoken to management, she could have spoken  
13 to employee relations. She didn't do any of those  
14 things.

15 Instead, she inserted herself in a -- in  
16 a -- in a situation that she had nothing do with,  
17 and then asked a employee to lie.

18 Q. And last, the reference to the code of  
19 business conduct, ethics and conflict, Ms.  
20 Keefe-Wiseman already testified about this in terms  
21 of what provisions were violated. She violated  
22 Section 2 which relates to giving -- being truthful,  
23 fair and ethical?

24 A. Yeah.

25 Q. And 15 with respect to cooperation. And

1 as the decision maker, how did you -- why did you  
2 conclude that Ms. Thomas had violated those  
3 provisions of the code of ethics?

4 A. Because she -- she knowingly had  
5 information that the text message that she sent was  
6 not true.

7 We had already understood from all of the  
8 information and the summary and from her  
9 conversation with Nathan Brown, she knew this not to  
10 be true.

11 Q. Did you consider Ms. Thomas's length of  
12 service with the Company?

13 A. I did. On her three -- I struggled with  
14 the three-day suspension. And the reason why we  
15 didn't -- why I didn't move for a termination is  
16 because of her tenure with the Company.

17 Q. Well, explain that more with respect to  
18 the three day.

19 A. Are you asking me to --

20 Q. Yes. Explain it more.

21 A. So she had a three-day suspension. Two  
22 very similar things. Not being honest in an  
23 investigation and then complete disregard of rules  
24 and regulations. She was -- this actually had so  
25 many legs to it.

1           So the first piece of it was her working  
2 off of the clock. And when she was -- when she was  
3 asked about that, she said that she was finishing up  
4 one transaction, that a guest needed some change for  
5 a hundred bill, something to that effect.

6           And the reason why that went on so long  
7 is because we kept learning more information. We  
8 had to take more days to investigate and pull all  
9 of the checks. It takes time to pull all of that  
10 information.

11           And it turned out that she was continuing  
12 to work off the clock. Not only in her station, but  
13 in another co-worker's station, it was an on-call  
14 person. And that person took that as her literally  
15 stealing from her because that was gratuity that  
16 would have went to that individual.

17           So she stayed on the clock because she  
18 has a deal with her and another co-worker Rose that  
19 they split tips.

20           Q.     Well, that was gonna be one of my  
21 questions. On Joint Exhibit 4, the suspension  
22 notice, there's a reference in the management  
23 evaluation section to Rule 28, dishonesty.

24           How was she dishonest during the course  
25 of that investigation?

1           A.     She was dishonest by saying that she  
2 really just ran back quickly to help out a guest and  
3 to help out a co-worker who didn't know how to  
4 handle a transaction. If that were the case, she  
5 would have gotten a three-day suspension.

6                     But the truth was is that she continued  
7 to work off the clock, opened up an additional check  
8 after she had clocked out and service that guest.

9           Q.     And according -- she was there for 45  
10 minutes?

11          A.     She was there for 45 minutes. And in  
12 addition to that, she had her underage daughter in  
13 the bar again after being spoken to in December to  
14 not do that.

15                    So I just feel like it was a blatant  
16 disregard for the rules and regulations, a disregard  
17 to the Company, putting the Company in jeopardy by  
18 having an underage person in the bar and working off  
19 the clock another -- putting the Company in a bad  
20 situation. And --

21          Q.     Sorry. Go ahead.

22          A.     And literally taking money away from a  
23 co-worker working outside of her station.

24                    I also thought about the piece where we  
25 have this issue with cocktail servers where they're

1 two minutes in somebody else's station because it's  
2 all about getting the gratuities.

3 So she's all aware about what that causes  
4 in that department when somebody does that. And so  
5 she had well knowledge -- enough knowledge not to do  
6 that and she completely disregarded that policy and  
7 procedure and worked into somebody else's station to  
8 get those gratuities.

9 Q. And how did that dishonesty inform your  
10 decision about dishonesty in the termination?

11 A. There was a pattern of dishonesty. One,  
12 we keep going back to this text message. And I have  
13 to go back to the same how did she get herself  
14 involved in this. There was no reason for her to be  
15 involved other than a brand new manager asked a  
16 question about a shop steward and what would be the  
17 process of completing an SPI.

18 And that turned into her contacting Lee  
19 Crain. And he clearly didn't respond back to her  
20 and she continued to call him and then started  
21 sending text messages.

22 Q. Did you consider whether a lesser penalty  
23 would have been appropriate?

24 A. So I looked at everything. I -- I take a  
25 lot of time and pulled the record and looked through

1 more of the details.

2 She had that verbal that we just  
3 discussed, she had a verbal for reopening a check or  
4 transferring a check into her name that belonged to  
5 somebody else. There was a gratuity on that and so  
6 she intentionally opened up --

7 MS. NIETO: I'd like to object on the  
8 mentioning of the verbal.

9 THE WITNESS: It's progressive --

10 MS. NIETO: -- into evidence.

11 THE WITNESS: -- discipline.

12 THE ARBITRATOR: Wait a minute. Sorry.

13 MS. NIETO: Counsel withdrew the verbal.  
14 We don't have any proof that it was actually issued  
15 to the Grievant. And so --

16 MR. TRIMMER: And let me clarify in my  
17 withdrawal of that exhibit now. I withdraw it with  
18 the utmost respect to the arbitrator, but as I said,  
19 that issue is between the parties --

20 MS. NIETO: -- and use it.

21 MR. TRIMMER: Pardon me?

22 MS. NIETO: You can't withdraw it and use  
23 it.

24 MR. TRIMMER: I'm not done yet.

25 THE ARBITRATOR: Continue.

1 MR. TRIMMER: And as I said, that's the  
2 issue of a very large ongoing general grievance  
3 between the parties. And it wasn't something that  
4 we discussed submitting to you today. And so I  
5 don't think it would be appropriate in light of that  
6 to have any arbitrator weigh into that and make a  
7 ruling that could be used in some other proceeding.  
8 And that's why I withdraw it. And so we won't offer  
9 any testimony about it now.

10 MS. NIETO: Thank you.

11 BY MR. TRIMMER:

12 Q. So with respect to the termination, did  
13 you consider whether you could have given her  
14 another suspension or whether that would have been  
15 appropriate?

16 A. I didn't think it would be appropriate to  
17 give the exact same discipline for the exact same  
18 offense when it was so egregious.

19 What made this more egregious than the  
20 first three-day suspension, which I do believe was  
21 egregious, is that she put another individual in  
22 jeopardy if he would have followed her advice.

23 People look at shop stewards for advice  
24 and they do take their words seriously. And if Lee  
25 Crain would have followed that directive, he might

## REPORTER'S CERTIFICATE

STATE OF NEVADA )  
COUNTY OF CLARK ) ss

I, JoAnn Melendez, Certified Shorthand Reporter, do hereby certify that I took down in Stenotype all of the proceedings had in the before-entitled matter at the time and place indicated and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and that the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto set my hand in the County of Clark, State of Nevada, this 11th day of December 2017.

*JoAnn Melendez*  
JoAnn Melendez  
CCR No. 370

1 IN ARBITRATION PROCEEDINGS BEFORE

2 ARBITRATOR GARY L. AXON

3 In the Matter of a )  
4 Controversy Between: )

5 MGM GRAND, )

6 Company, )

7 and )

8 CULINARY WORKERS LOCAL 226, )

9 Union. )

10 )

11 Re: Cynthia Thomas )  
(Grievant) )

12 )

13 )

14 )

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 VOLUME II

17 BEFORE GARY L. AXON, ARBITRATOR

18 Taken on Thursday, November 30, 2017

19 At 10:00 a.m.

20 At MGM Grand Hotel & Casino  
21 3799 Las Vegas Boulevard South  
22 Las Vegas, Nevada 89109

23

24

25

Reported by: Cynthia L. Gloe, RPR, CCR No. 607

1 and she was there. And he thought to question her because  
2 that's kind of what he does with the shop stewards when he  
3 has a question.

4 Q. Do you recall if he stated that he had ever  
5 approached Ms. Thomas before then?

6 A. Yes. Yes, he had.

7 Q. Did he say -- do you recall if he said  
8 approximately how often he would reach out to Ms. Thomas?

9 A. Just as a matter of convenience. Again, like if  
10 he was in the lounge or if he had a specific question and  
11 she happened to be nearby.

12 Q. But he had sought out Ms. Thomas for other  
13 questions related to --

14 A. He specifically referenced when she worked in  
15 Rouge, that he had approached her in Rouge.

16 Q. Do you recall if he mentioned knowing that  
17 Ms. Thomas had just come back from medical leave?

18 A. I cannot recall.

19 Q. From your experience as a shop steward, does  
20 management often approach shop stewards for advice or  
21 counsel?

22 A. Yes.

23 Q. And is that pretty routine?

24 A. Yes.

25 Q. Do you recall if Mr. Brown stated that the

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  

CERTIFICATE OF REPORTER

I, Cynthia L. Gloe, CCR No. 607, a Certified Court Reporter licensed by the State of Nevada, do hereby certify:

That I reported the proceedings had in the before-entitled matter commencing on November 30, 2017, at the hour of 10:00 a.m.;

That I thereafter transcribed my related shorthand notes into typewriting and that the typewritten transcript of said arbitration is a complete, true, and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 21st day of December, 2017.

*Cynthia L. Gloe*

Cynthia L. Gloe, RPR, CCR No. 607

# EXHIBIT 3

# EXHIBIT 3



+1 (702) 810-2719

em



iMessage

Thu, Sep 29, 2:41 PM

It's Cynthiaight away

Thu, Sep 29, 11:53 PM

Hey it's Cynthia can you call  
me

Friday 12:33 PM

Lee.

It's Cynthia. Call me

Will do in a meeting

Delivered

Ok.

It's very important. !!

Claim. U saw her entering stuff  
on the computer and you  
figured the printer failed so you  
gave her the beer she asked  
for



iMessage



# **EXHIBIT 4**

# **EXHIBIT 4**

IN THE MATTER OF ARBITRATION

BETWEEN

CULINARY WORKERS UNION,  
LOCAL 226,

Union,

and

MGM GRAND HOTEL & CASINO,

Employer.

ARBITRATOR'S OPINION

AND AWARD

GRIEVANCE OF

CYNTHIA THOMAS

HEARING SITE:

MGM Grand Hotel and Casino  
Las Vegas, Nevada

HEARING DATES:

November 14 and 30, 2017

RECORD CLOSED ON RECEIPT OF BRIEFS:

March 2, 2018

REPRESENTING THE UNION:

A. Mirella Nieto  
McCracken Stemerman & Holsberry LLP  
595 Market Street, Suite 800  
San Francisco, CA 94105

REPRESENTING THE EMPLOYER:

Paul T. Trimmer  
Jackson Lewis PC  
Suite 600  
3800 Howard Hughes Parkway  
Las Vegas, NV 89169

ARBITRATOR:

Gary L. Axon  
P.O. Box 190  
Ashland, OR 97520

I. **INTRODUCTION**

This case arises out of the October 18, 2016 dismissal of Cynthia Thomas (Grievant) from her position as a Lounge Server/Cocktail Server with MGM Grand Hotel and Casino (Company or Employer). The Culinary Workers Union, Local 226 (Union) grieved the termination. When the termination dispute was not resolved in the lower levels of the grievance procedure, the Union moved the case to arbitration.

Prior to hearing the grievance contesting Grievant's termination, your Arbitrator was charged with deciding whether the parties entered into a Settlement Agreement, reducing a three-day suspension issued to Grievant Thomas on January 29, 2016 to a written warning with back pay. A hearing was held on the Settlement Agreement issue prior to moving to the merits of the grievance. Based on the record evidence, your Arbitrator found the Union failed to present any relevant material evidence to establish the existence of an enforceable Settlement Agreement reducing Grievant Thomas' January 29, 2016 three-day suspension to a written warning with back pay. Therefore, your Arbitrator sustained the Employer's motion dismissing the Union's argument over the existence of a Settlement Agreement reducing the three-day suspension to a written warning with back pay.

The case then moved on to the issue of whether there was just cause to terminate Grievant Thomas. The parties were given the full and complete opportunity to offer evidence and argue their respective cases. Post-hearing briefs were timely filed. The termination issue is now properly before the Arbitrator for a final and binding decision.

## **II. STATEMENT OF THE ISSUES**

The parties were unable to agree on a statement of the second issue to be decided by the Arbitrator. The Company framed the questions to read:

Did the Company lack just cause when it terminated the Grievant pursuant to Article 18.01 of the Collective Bargaining Agreement, and, if not, what is the appropriate remedy?

The Union framed the questions to read:

Was the Grievant, Cynthia Thomas, discharged for just cause? If not, what is the remedy?

Based on the evidence and argument of the parties, the Arbitrator adopts the Union's formulation of the issues to be decided by the Arbitrator.

The parties agreed if the grievance is denied, the issue of remedy becomes moot. If the Union prevails in this matter, the remedy issue will be returned to the parties for appropriate computations and calculations. The Arbitrator will retain jurisdiction for a period of sixty (60) days after the issuance of the Award to assist with the implementation of remedy, if any.

## **III. RELEVANT CONTRACTUAL PROVISIONS**

**Collective Bargaining Agreement Between MGM Grand  
And  
Culinary Workers Union Local 226 & Bartenders Union  
Local 165 Local Joint Executive Board of Las Vegas**

...

### **ARTICLE 18 DISCIPLINE**

#### **18.01 Cause for Discharge**

(a) No regular employee, after having completed the introductory period under Section 7.01, shall be disciplined

and/or discharged except for just cause. The Employer shall follow a system of progressive discipline. The parties agree that progressive discipline normally requires, prior to suspension or discharge, that an employee be given a written opportunity to correct the deficiency, but that within the principle of progressive discipline, the Employer may impose immediate suspension or discharge for dishonesty, incompetence, misconduct, insubordination, discourteous conduct toward a guest, failure to report to work without just cause, walking off the job during a shift, or drinking alcohol or use of controlled substance, or being under the influence thereof, during the employee's shift.

...

#### 18.04 Disciplinary Suspensions

Suspensions shall become null and void one (1) year after the date of issuance and may not thereafter be used as a basis for or in support of any subsequent discharge or disciplinary action.

Jt. Ex. 1.

#### IV. STATEMENT OF FACTS

On March 22, 2005 Grievant Cynthia Thomas was hired by the Company to work as a Cocktail Server/Lounge Server dual classification. Grievant also served as a Union Shop Steward for approximately five years prior to her termination. Tr., pp. 225, 340. In January 2016 Grievant received a three-day suspension for misconduct that included violations of GRC Rule #28 prohibiting dishonesty. The suspension was still active at the time of Grievant's termination. Tr., p. 288; Jt. Ex. 4.

On March 3, 2016 Grievant sustained an on-the-job injury. She continued working until undergoing surgery on September 2, 2016. Grievant developed a severe infection following the surgery and was off work on medical leave until September 25, 2016. Tr., pp. 367-368.

On September 28, 2016 Grievant completed her regularly scheduled shift. She then went to another MGM bar to see if she could pick up some extra hours. While she waited at the bar, Assistant Beverage Manager Nathan Brown saw Grievant and approached her. Brown was an inexperienced manager and knew Grievant was a Shop Steward. He asked for her guidance on the procedure for employees being placed on suspension pending investigation (SPI). Grievant asked Brown for specifics, including the names of the employees involved. Brown conveyed he had witnessed Bartender Lee Crain give Cocktail Server Fontay Jones a beer, which she delivered to a customer's table, without properly entering the transaction into the computer. Tr., pp. 88-93; 355-357; Er. Ex. 3.

The night Crain was suspended pending investigation Crain began receiving phone calls from an unknown number. Crain testified the individual called approximately 4 or 5 times but did not leave messages. Crain did not return the calls. Tr., pp. 114, 360. On September 29, 2016 Crain began receiving text messages from the same number. Grievant Thomas and Crain had worked together in the past. Through the text messages Crain learned the unknown phone number belonged to Grievant.

The text message thread reads [sic]:

Thu, Sep 29, 2:41 PM: It's Cynthiaight away

Thu, Sep 29 11:53 PM: Hey It's Cynthia can you call me

Fri 12:33 PM: Lee. It's Cynthia. Call me.

Crain responded to the Fri 12:33 message writing:

Will do in a meeting.

Grievant wrote back:

Ok. It's very important!! Claim. U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for

Er. Ex. 4; emphasis added.

Crain was uncomfortable with Grievant's text message. He had not seen Jones entering "stuff" on the computer. He believed Grievant was instructing him to lie about what had occurred. Crane did not respond to Grievant's final text. Nor did he claim he saw Jones entering the sale of the beer into the computer during his due process meeting. Crane was quickly returned to work with a verbal warning. When Crain returned to work he contacted a Shop Steward about Grievant's text message. The other Shop Steward was not available to assist, so referred Crain to Shop Steward Randy West. Crain and West took Grievant's text message to General Manager Dan Groesbeck. On October 1, 2016 Groesbeck forwarded the text message to Human Resources Business Partner Maureen Keefe-Wiseman. Tr., pp. 119-121, 184-186.

On October 3, 2016 Grievant Thomas was placed on suspension pending investigation. A due process meeting was held on October 7, 2016 to obtain Grievant's version of the events surrounding her text message to Crain. Keefe-Wiseman concluded her investigation on October 14, 2016 and reported her findings to the Food and Beverage Department. Management found Grievant interfered in an ongoing Company investigation. Tr., pp. 186-206, 216-217; Er. Exs. 7, 8, 10.

On October 18, 2016 the Employer terminated Grievant's employment. The Separation PAN reads, in relevant part:

Cynthia Thomas is being separated from the company in accordance with article [1]8, section 8.01 (a) of the CBA for progressive discipline. Termination reason for violation of

GRC #28 Dishonesty. Employees will be forthcoming and honest in all written and verbal communication connected to company investigations, company records and communications. Employees will not knowingly make false statements or omit pertinent information particularly regarding company reports and investigations. #21 Failure to cooperate during or interference with a company investigation. Refusal to cooperate with, provide information to or identify yourself to management, security or a guest. #39 failure to comply with the MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy. Specifically, Thomas sent a text message to another employee directing them to lie in a Company investigation.

Jt. Ex. 5; emphases added.

On October 20, 2016 the Union grieved the termination. The Union's letter reads, in relevant part:

...

It is the Union's position that this grievance pertains to a violation of Article 6, Section 6.01 and 6.04 and all other pertinent provisions of the Collective Bargaining Agreement. The Grievant denies any wrongdoing that would warrant the suspension and termination. It is the Union's position that the suspension and termination notices were unjustified and the Grievant should be reinstated immediately and is entitled to be compensated for all loss of wages and benefits of the Agreement.

We are hereby requesting a meeting of a Board of Adjustment with Diane Woolman as a Board Representative.

...

Jt. Ex. 3.

When the grievance was not resolved at the lower levels of the grievance process, the Union moved the case to arbitration. A hearing was held at which time both parties were given the full and complete opportunity to offer evidence and argue the case. Post-hearing briefs were timely filed. The case is now properly before the Arbitrator for a final and binding decision.

**V. POSITIONS OF THE PARTIES**

**A. The Company**

The Company contends it proved by clear and convincing evidence just cause for terminating Grievant Thomas. Grievant engaged in the conduct set forth in the Separation PAN. She attempted to subvert a Company investigation by instructing the subject of that investigation to lie. Grievant acted with the intent to interfere with the Company's Investigation. Her misconduct warrants immediate discharge pursuant to the Collective Bargaining Agreement (CBA).

It was proved Grievant obtained information regarding the investigation of Crain and Jones from Nathan Brown. Grievant used this information to tell Crain to give a false story to Human Resources during his due process meeting. Grievant had no role in the Crain/Jones incident yet she intentionally injected herself into the situation without any legitimate reason for doing so and without taking the appropriate steps to ensure she was giving appropriate advice. Grievant knew Jones failed to enter the sale of the beer into the computer because this is what Brown told her he witnessed. If Grievant admitted she knew this fact was not true yet instructed Crain to make the statement, the only reasonable explanation for her communication was to tell Crain to lie.

Grievant's decision to coach an employee to make an untrue statement during a Company investigation directly breaches the Company's Conduct Standards. Grievant's acts were intended to impede or misdirect an investigation in breach of Rule #21. Her instructions to Crain to say things she knew were false breaches Rule #28. The intent of Grievant's instructions was to tamper with an investigation, which is a

breach of Section 15 of the Code of Ethics as well as a breach of Rule #39 requiring adherence to the ethics code.

The Company argues it proved there was no innocent intent behind Grievant's text messages. Brown solicited Grievant's opinion as a Shop Steward. Grievant had no knowledge of the Crain/Jones incident other than what Brown told her. It is clear Grievant was motivated by an intent to interfere with the investigation and she cannot prove the contrary. No reasonable individual, a Shop Steward or otherwise, would have coached a witness to say something that individual had no reason to believe was true. Grievant had no reason for contacting Crain other than to involve herself in the investigation and to tell him what to say. At best, Grievant was knowingly reckless as to the truth of the situation. She conducted no investigation. She made no effort to follow up.

The Company conducted a full, detailed, and fair investigation. The Company did not rush to judgment even with what appeared to be overwhelming evidence of Grievant instructing Crain to lie. During her due process meeting, Grievant denied any intent to direct Crain to lie. She said she was simply telling him to think through the process. This too was a lie because the text messages themselves contain no information to that effect. Grievant was advised during her due process meeting that the prior dishonesty suspension was a serious concern. Grievant was given the opportunity to provide a written statement, but she elected not to. This strategic decision on Grievant's part should undermine any due process claim she makes.

Termination was the appropriate penalty for Grievant's misconduct. The CBA specifies summary discharge is appropriate for dishonesty and misconduct.

Dishonesty is considered a cardinal sin to the employee/employer relationship. Although the contract language does not require the Arbitrator to find intent to uphold summary discharge, it is clear Grievant intended to instruct Crain to lie. The words in her text message leave no room for a contrary interpretation or doubt as to her intent. Termination was appropriate in light of existing progressive discipline.

The Union's contention the Company may not rely on a theory of summary discharge because the Separation PAN indicates termination for dishonesty pursuant to progressive discipline is wrong and inconsistent with arbitral precedent. The Separation PAN specifies the CBA provision, rules violated, and the exact nature of the misconduct. Grievant cannot now cry foul when she presented an entire case-in-chief against the same evidence that would be presented against her for dismissal pursuant to summary discharge. The Union's objections and arguments on this point are superfluous and based on semantics.

The Union's contention Grievant's behavior should be excused because she was under the influence of prescription drugs is without merit. A doctor cleared Grievant to return to work. She admitted she was not taking the medications when she sent the text message. The records she presented at the hearing all proved her medications had run out and were not being ingested at the relevant time. The Union did not bring any evidence Grievant was taking prescription medication in September 2016. A claim of medical justification or excuse is an affirmative defense. The Union did not come close to meeting its burden of proof.

Any argument Grievant's due process rights were denied because she was not shown a copy of the text message during the due process meeting is without

merit. Grievant was given ample opportunity to give an explanation for contacting Crain. She did not need to see the message to clarify her intent. Further, Grievant had the texts on her phone but destroyed them. She sought to justify this spoliation by asserting she routinely deletes all of her text messages then later testified she only deletes unimportant messages. Her incoherent explanation does not establish Grievant was prejudiced in any way by not seeing the text messages. Had Grievant been shown the text messages her position would not have changed.

The Company urges the Arbitrator to deny the Union's grievance.

**B. The Union**

The Union argues the Company's decision to terminate Grievant was arbitrary and without just cause. She was a longtime employee who was unjustly charged and punished for engaging in Shop Steward duties. She did nothing wrong in texting Crain. Grievant broke no rules, duties or loyalties to the Company and she was not dishonest.

A termination based upon dishonesty would stigmatize Grievant by blemishing her reputation and impacting her ability to find gainful employment. Further, Grievant is a Shop Steward and a termination on this basis would affect her ability to protect the rights of Union employees. For these reasons the Company must prove its case through clear and convincing evidence. Intent is a critical component when an employee is disciplined for dishonesty. The Company failed to prove Grievant directed Crain to lie.

The Company's focus on the final text message and the word "claim" fails to patently prove Grievant was dishonest. Grievant was on a number of medications

that clouded her thinking process and communication delivery. The text message thread shows short messages containing grammatical errors. Grievant did not deny sending the messages. She simply could not recall the content of any specific text message due to the side effects of her medications. Grievant made clear she would never tell an employee to lie and she was not known to be a liar. She was a longtime Shop Steward who had participated in a number of disciplinary matters and her trustworthiness, as a Shop Steward had never before been questioned.

The Union alleges there are a number of reasons that existed to explain the use of the word "claim." It could have been an autocorrect mistake. It could have been a poor attempt to summarize the facts in a quick text message. It was clear this message was a precursor to a more in-depth conversation she wanted to have with Crain to uncover more facts. Crain never called her back.

Third party opinions about the intent of Grievant's text messages are based on nothing more than conjecture. The Company's jump to the conclusion Grievant was being dishonest in this case is based on a lack of understanding of the role of a Shop Steward. Crain never spoke to Grievant about the messages received to clarify her intentions. The messages on the thread are the complete universe of messages received and shed no light or understanding on the situation.

The Company did not prove Grievant interfered in a Company investigation and that she was dishonest in reaching out to Crain. Grievant did not insert herself into the investigation involving Crain. The uncontroverted evidence shows Brown approached Grievant and spoke to her about the incident. His sole intention was to seek guidance from her because she was a Shop Steward. Shop Stewards of one

Union were often used to represent members of the other Union. There was no rule prohibiting a Shop Steward from reaching out to an employee to discuss disciplinary matters brought to their attention by management. Brown never told Grievant the discussion was confidential. Grievant knew Crain when she reached out. Grievant was not dishonest nor did she direct an employee to lie. The termination is unjustified.

The Company cannot meet its burden of proof for Grievant's termination under a theory of progressive discipline. Progressive discipline has two objectives: notice and an opportunity to reform. Under the CBA progressive discipline "requires, prior to suspension or discharge, that an employee be given a written opportunity to correct the deficiency." Un. Br., p. 17. To terminate an employee for progressive discipline the Company requires a verbal warning, followed by a written warning, then a suspension (of differing duration), with the final step being termination. At the time of termination, Grievant had a three-day suspension, for which a grievance had been filed and whose continued status as a suspension is disputed by the Union. No other live discipline was introduced into the record. Therefore, according to the Company's own progressive discipline system there were insufficient warnings to terminate Grievant on this basis.

The Company failed to prove Grievant violated any internal conduct rules thus lacked just cause for termination. Grievant was not dishonest. She had no reason to instruct Crain to lie and the Company presented no motive for dishonesty. Grievant did not interfere or tamper with an investigation in her capacity as a Shop Steward. Based on her conversation with Brown, she believed Jones appeared to ring up the beer. As a Shop Steward, it was appropriate for her to reach out to Crain. Grievant fully

cooperated in the investigation leading up to her termination. The record does not prove Grievant refused to provide a written statement. She did not remember providing one, but that is not a refusal. Grievant was going through a serious medical condition, recovering from surgery, and was under the influence of medication and she may simply have forgotten. Grievant was forthcoming, admitted texting Crain and denied instructing him to lie. The Company withheld the text message and after obtaining a copy with Grievant's phone number on it failed to follow up with her to seek clarification.

The Company reached an arbitrary decision, relying on incomplete and unreliable evidence and in so doing denied Grievant her due process rights. Management failed to consider all sides of the incident, concluding without any basis Grievant was dishonest, directed an employee to lie, and interfered in an investigation. Grievant was not provided access to all evidence against her. Therefore, Thomas was denied the opportunity to fully defend the allegations.

Grievant was terminated under a theory of progressive discipline, not a theory of summary discharge. The Company could have opted to terminate Grievant summarily, the CBA permits it, but it chose not to do so and relied instead on a theory of progressive discipline. In doing so, the Company had the duty to justify the discharge with the Grievant's history of prior misconduct, and this it failed to do. Her record was not as bad as the Company claimed. Once an employer chooses to terminate an employee for progressive discipline, the mere fact that dishonesty is conduct that allows for immediate termination does not absolve the Company from establishing the necessary foundation or steps for progressive discipline. The Company's sudden

change from a theory of progressive discipline to one of summary discharge demonstrates its decision to discharge Grievant was arbitrary.

The Union opines Grievant Thomas was a credible witness. She was consistent throughout the process. Nothing in management's notes indicate Grievant was untruthful. Tony Venci confirmed Grievant told management she was on medication. Grievant's lapse in memory does not evidence she was untruthful or withholding information. Unlike Grievant, Crain's testimony was inconsistent, not credible, and should not be relied on.

Termination in this case is unwarranted. The purpose of a disciplinary penalty is corrective and rehabilitative rather than punitive. Grievant was a twelve (12) year employee receiving awards and recognitions during this time. She was an asset to the Company serving as a Shop Steward. She is not a liar and her trustworthiness in disciplinary matters was never questioned until this incident. Grievant was an employee going through a real and disruptive medical situation who was trying to hold it together while heavily medicated. She communicated her concerns to the Company but was flatly ignored. Grievant is eager to return to work. Her discharge is not warranted.

The grievance should be sustained and Grievant reinstated with full back pay and benefits under the CBA.

## **VI. DISCUSSION**

Your Arbitrator finds the Company proved by clear and convincing evidence just cause for the October 18, 2016 discharge of Grievant Cynthia Thomas. Accordingly, the grievance will be dismissed. The Arbitrator's conclusions are supported by an examination of the contract language and the evidence presented at

the arbitration hearing. The parties' detailed arguments set forth in the post-hearing briefs are summarized above in Section V, Positions of the Parties, of this Award and will not be repeated. The reasoning of the Arbitrator is set forth in the discussion that follows.

I must decide whether the Company proved by clear and convincing evidence that (1) Grievant Thomas engaged in the conduct alleged in the termination notice, and (2) the conduct was such to provide just cause for summary dismissal.

The Separation PAN alleges "... Thomas sent a text message to another employee directing them to lie in a Company investigation." Jt. Ex. 5. The text message at issue reads:

Ok. It's very important!! Claim. U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for

Er. Ex. 4.

The Company's very serious allegation that Grievant was dishonest during an investigation is compounded by the fact she was a Shop Steward, charged with representing members of the bargaining unit with honesty and integrity.

An employer is unquestionably entitled to have employees who are honest and trustworthy. I agree with the Company that intentional dishonesty may be grounds for immediate termination. Conversely, when an employee is charged with a serious crime, such as dishonesty, the consequences for the employee can be devastating. The stigma associated with a charge of dishonesty can destroy an individual's ability to find further employment in the community. Therefore, arbitral authority requires that, in a charge involving dishonesty, an employer must prove the employee acted with the

willful or deliberate intent to deceive. That proof must be clear and it must be convincing.

Proof of intent often depends on circumstantial evidence. This is the type of evidence distinguished from direct evidence, which requires an arbitrator to draw an inference from certain facts in order to determine the truth of others. Circumstantial evidence alone, if sufficient, may support a disciplinary action. However, such evidence must be consistent with a theory of guilt and inconsistent with any reasonable theory of innocence.

Grievant admits she sent the text message to Crain. He then brought it to management's attention because Grievant's instructions were not factually accurate. Crain believed Grievant was telling him to lie during the investigation. Tr., pp. 117-119; Er. Ex. 5. Your Arbitrator's examination of the plain language in the text shows it is clearly written and extremely incriminating. "Ok. It's very important!! Claim. U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for." Jt. Ex. 4; emphasis added. Grievant insisted she did not direct Crain to lie during the investigation. Your Arbitrator is not persuaded by this assertion. Grievant was given ample opportunity to present a rational explanation for the explicit instructions conveyed to Crain in the message yet failed to do so.

I find Grievant Thomas was not a credible witness. She had multiple memory lapses on key issues regarding her intent for sending the text message. These memory lapses contrasted sharply with clear recollections on key issues relied on for exculpation.

On October 7, 2016 Grievant was summoned by management to give a statement. She did not know the reason for the meeting, mistakenly believing it was about an unrelated incident discussed with Human Resources approximately ten days earlier. When management informed Grievant the meeting was about a text message she sent to another employee instructing them to lie in an investigatory meeting, Grievant immediately focused on the text message she had sent to Crain. She distinctly recalled her conversation with Assistant Beverage Manager Brown. She claimed Brown told her Crain gave Jones the beer because Crain had seen Jones was on the computer and thought it had been rung up. Grievant went on to explain that sometimes receipts would not print. Er. Ex. 10. Grievant clearly reiterated her position during the arbitration hearing, testifying:

... from what I recall, he observed her, like, trying to enter stuff on the computer, and then called out a beer. And he asked the bartender for a receipt, and it didn't print ...

Tr., p. 355.

If Brown told Grievant he saw Jones trying to ring up an order before retrieving the beer from Crain her text message could prove factually true. Grievant was a trained Shop Steward and had assisted multiple members of the bargaining unit during investigations. She understood telling the truth was an essential component during an investigation. Grievant had an active suspension for dishonesty during a prior investigation. She understood that if it was found she instructed Crain to lie, she could face termination. If Grievant's version of the conversation with Brown was found to be accurate, it could exonerate her from discharge.

But, Grievant's clear recollection of her conversation with Brown is totally at odds with Brown's version. When Brown sought Grievant's counsel as a Shop

Steward he recalled engaging in a detailed discussion about the Crain/Jones incident. Brown told Grievant he witnessed Jones getting a beer from Crain without first ringing it up. Grievant played devil's advocate, positing situations where a server might not ring up a drink order at the time the drink was delivered. Brown told Grievant that none of the possible scenarios she proposed had occurred. He specifically said he ended up ringing in the beer himself. Brown's testimony during arbitration and his two statements to management were consistent with his explanation of what he witnessed with Crain/Jones and the content of his ensuing conversation with Grievant. Tr., p. 89-92; Er. Exs. 2, 3. Crain's version of events corroborated Brown's version. Crain did not see Jones at the computer and there was zero evidence the printer had been malfunctioning. Tr., p. 122; Er. Ex. 5. Therefore, I find nothing in the record evidence to lead your Arbitrator to conclude Brown bore any animosity toward Grievant or that he had a motive to be untruthful during the investigation.

On October 3, 2016, four days after Grievant sent the text message to Crain, she could not remember what she had written. When pressed about when and why she deleted the text message her testimony vacillated from an assertion she always deletes text messages to free up phone memory space to claiming she only deleted unimportant messages. Her text message to Crain started, "OK, it's very important.!!" In spite of having no memory of what she wrote to Crain, Grievant asserted absolutely she did not intend to tell Crain to lie, but to tell him he needed to think through what his process was. She merely wanted to reach out to him to discuss what had been brought to her attention. Tr., pp. 359, 379; Er. Ex. 10. I find the clear

verbiage in Grievant's text message to be inconsistent with this unsubstantiated self-serving assertion.

Grievant blamed her memory lapses on illness and medications. She testified,

This, I don't – I don't recall – what I need you to understand is I was in such a – very bad health. My health was not good. That's all I can tell you. I was suffering for months, and then crucially during this period of time anyway, because I spent time in the hospital after I had surgery, and I was in the hospital – like, right before I came back to work, I was heavily medicated to kill an infection or suffer another operation to cut the infection out. Do you not – like, I was sick and taking a ton of medication or surgery; so they medicated me. ...

Tr., p. 383.

A claim of medical justification or excuse is an affirmative defense that must be proven by the party relying upon the excuse. Since Grievant Thomas is relying upon her medical condition as justification for an inability to fully or accurately remember certain key facts, the Union is charged with presenting sufficient evidence to support this allegation.

Grievant's medical doctor released her to return to work without restrictions. The doctor did so on September 25, 2016. Three days later she met with management about an unrelated text message she had sent while away from work on leave. During that September 28 meeting, Grievant stated she was on medication and that her judgment may have been compromised. When pressed, Grievant said she had not taken the medication while at work and was not impaired. But, she was feeling overwhelmed. Keefe-Wiseman asked if Grievant might want to take a break from Shop Steward duties to lighten the load. Grievant gratefully accepted the offer. Keefe-

Wiseman said she would let management know Grievant was taking a break from her Shop Steward work. Tr., pp. 236-239, 373.

Despite Grievant's multiple assertions she was overwhelmed and needed to lighten her load, following the meeting with management she worked her full shift, and then sought additional work at another bar. No one compelled Grievant to seek extra work hours. When Brown approached Grievant she could have easily told him she was taking a break from Shop Steward duties. She chose not to and instead actively engaged in a lengthy discussion. Almost immediately after her conversation with Brown, Grievant started telephoning Crain, making eight attempts to connect with him over the course of two days. Tr., pp. 114-115; Er. Ex. 4. I find Grievant's conduct is not consistent with that of someone who was overwhelmed by illness and impaired by medication, seeking a break from the stress imposed by the extra duties of Shop Steward work.

During arbitration, the Union presented numerous empty prescription medicine bottles, internet printouts of the medications' side effects and Grievant's extensive testimony the medications had a huge impact on her reasoning and memory. There was no evidence that any of the prescriptions were current. When asked whether the medicine bottles were the last of the drug she received, Grievant testified, "I don't know. Those are some of the ones I've saved. I don't know if I've thrown some away or not. I don't know." Tr., p. 389. On cross-examination Grievant was asked when or if she refilled each prescription shown on each bottle. Her consistent answer to each of counsel's questions was "I don't know." Tr., pp. 389-391. Grievant testified she had not taken her medications while she was working. When asked which prescription caused

her to be forgetful she testified, "I don't know. I was taking so many I don't know." When asked whether she was forgetful from March through September, she replied, "I don't know. I don't know how to answer that question." Tr., pp. 370-371, 374. Your Arbitrator holds the Union failed to submit sufficient credible evidence to prove Grievant's medical condition was a legitimate excuse for her conduct between September 28, 2016 and October 7, 2016 leading to discharge.

I hold the record evidence before me is consistent with a theory of guilt and inconsistent with any reasonable theory of innocence. Your Arbitrator concludes the Employer proved through clear and convincing evidence Grievant intended to instruct Crain to lie to management during a Company investigation meeting.

The Separation PAN asserts Grievant violated General Rules of Conduct (GRC) #21, #28, #39, and the MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy by sending "... a text message to another employee directing them to lie in a Company investigation." Jt. Ex. 5. Having concluded the Company proved Grievant intended to instruct Crain to lie to management during a Company investigation, I next explore whether this misconduct violated the rules cited in the Separation PAN. GRC Rule #21 reads:

21. Failure to cooperate during or interference with a Company investigation. Refusal to cooperate with, provide information to or identify yourself to management, security or a guest.

Er. Ex. 13, p. 38.

I hold that when Grievant instructed Crain to lie during his investigation, she violated GRC Rule #21 by interfering with a Company investigation. GRC Rule #28 reads:

28. Dishonesty. Employees will be forthcoming and honest in all written and verbal communication connected to

company investigations, company records and communications. Employees will not knowingly make false statements or omit pertinent information, particularly regarding Company reports and investigations.

Er. Ex. 13, p. 38.

I hold that when Grievant instructed Crain to lie during his investigation and was not forthcoming with the Company regarding her misconduct she violated GRC Rule #28.

GRC Rule #39 reads:

39. Failure to comply with the MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy.

Er. Ex. 13, p. 39.

MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy reads, in pertinent part:

1. Code of Conduct

...

Be truthful, fair and ethical;

...

15. Cooperation

You have a duty to cooperate with any and all Company investigations. We expect you to cooperate fully and truthfully with any internal investigation or audit and to respect the confidentiality of the process. You should never withhold, tamper with, or fail to communicate relevant information in connection with an internal investigation. ... Failure to cooperate fully with any internal investigation or audit may be grounds for disciplinary action, up to and including termination of your employment or business relationship with the Company.

I find Grievant violated MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy when she knowingly instructed another employee to lie

during an investigation and then failed to truthfully cooperate in the investigation regarding her misconduct.

Your Arbitrator turns to the question whether Grievant's conduct was such to provide just cause for summary discharge. The Employer's discipline must either stand or fall on the reasons given at the time of termination. The October 18, 2016 Separation PAN asserts Grievant Thomas "is being separated from the company in accordance with article [1]8 section 8.01 (a) of the CBA for progressive discipline." Article 18.01(a) of the parties' Collective Bargaining Agreement reads:

18.01. Cause for Discharge.

(a) No regular employee, after having completed the introductory period under Section 7.01, shall be disciplined and/or discharged except for just cause. The Employer shall follow a system of progressive discipline. The parties agree that progressive discipline normally requires, prior to suspension or discharge, that an employee be given a written opportunity to correct the deficiency, but that within the principle of progressive discipline, the Employer may impose immediate suspension or discharge for dishonesty, incompetence, misconduct, insubordination, discourteous conduct toward a guest, failure to report to work without just cause, walking off the job during a shift, or drinking alcohol or use of controlled substance, or being under the influence thereof, during the employee's shift.

Jt. Ex. 1; emphases added.

The parties' clear and unambiguous contract language mandates the Company follow a system of progressive discipline. The contract language further reads that the progression of the discipline "... normally requires, prior to ... discharge, that an employee be given a written opportunity to correct the deficiency, but that within the principle of progressive discipline, the Employer may impose immediate ... discharge for dishonesty ...." Jt. Ex. 1; emphases added. I find the clear and unambiguous contract

language allows, "within the principle of progressive discipline," for immediate discharge for dishonesty.

The doctrine of progressive discipline does not demand that in every case, every step of the process must be followed in an exact order. The facts and circumstances of individual cases allow an employer to bypass the normal progression in discipline when appropriate. The parties' CBA reflects the understanding that some incidents of misconduct are so severe that immediate discharge is appropriate.

Grievant Thomas worked for the Company for more than eleven years and understood the Company's rules and regulations. She knew she could be fired for dishonesty during an investigation. Er. Ex. 14. Grievant's misconduct was particularly egregious because she was an experienced Shop Steward charged with representing fellow members of the bargaining unit during the disciplinary process. In this advocacy role she had a higher duty to be honest, forthcoming, and to refrain from any activity, which could interfere with the integrity of an investigation. Thomas understood she was not supposed to coach witnesses or otherwise interfere in an investigation. Yet she did so. Grievant's instruction to Crain to lie during an investigation could have cost him his job. Grievant's dishonesty is an incident of misconduct and is so severe that immediate discharge is appropriate.

Your Arbitrator does not agree with the Union's assertion Grievant was punished for engaging in Shop Steward duties. This is not a case of an over zealous or vigorous Shop Steward advocating on behalf of a member. Protections for engaging in Union activities do not extend to an employee or Shop Steward, who is dishonest during an employer investigation.

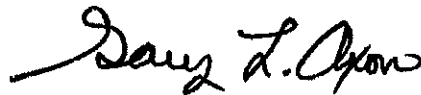
Your Arbitrator does not agree with the Union's claim that Grievant's due process rights were violated. Prior to reaching the decision to terminate Grievant from employment, the Company engaged in a full and complete investigation. Grievant was given ample opportunity to tell her side of the story. Multiple witnesses were interviewed. The decision to terminate Grievant was not made until the investigation was complete. The fact the Company did not give Grievant a copy of her text message during the due process meeting did not in any way prejudice Grievant's ability to fully defend herself. I find the Company's decision to terminate Grievant from employment was neither arbitrary nor capricious.

Given the severity of Grievant's misconduct, I find the Company proved through clear and convincing evidence just cause for the termination of Grievant Thomas. Grievant received a prior three-day suspension for being dishonest during an investigation. She did not learn from that experience. There is nothing in the record evidence to lead me to conclude Grievant can be rehabilitated with lessor disciplinary action. I find the Company rightfully determined that, under the full facts in this case, Grievant's long-term employment did not serve as a mitigating factor. There is nothing in the record evidence before me to hold Grievant should receive disciplinary action less than termination. I conclude the penalty of summary discharge was reasonably related to the seriousness of the offense committed by Grievant Thomas.

**AWARD**

Having reviewed all of the evidence and argument, and having had the opportunity to observe the demeanor of the witnesses at the hearing, the Arbitrator concludes MGM Grand Hotel & Casino had just cause for the discharge of Grievant Cynthia Thomas from employment on October 18, 2016. The grievance is denied and dismissed in its entirety. Pursuant to the Article 19.02(c)(5) the fees and expenses of the Arbitrator shall be paid by the party losing the arbitration. Since the Union is the losing party in this case, your Arbitrator's fees and expenses are payable entirely by the Union.

Respectfully submitted,

A handwritten signature in cursive script, reading "Gary L. Axon".

Gary L. Axon  
Arbitrator

Dated: April 2, 2018

# **EXHIBIT 5**

# **EXHIBIT 5**

1

COLLECTIVE BARGAINING AGREEMENT

Between



**MGM GRAND.**  
LAS VEGAS

And

CULINARY WORKERS UNION LOCAL 226  
& BARTENDERS UNION LOCAL 165  
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS

2008 - 2013

employees shall be paid the reasonable and necessary expenses incurred by them to attend the hearing or proceeding. Employees will also be compensated at their regular, straight-time hourly rate of pay for any time lost from work less any allowance they received by the agency or court involved.

Time spent at administrative hearings and/or court proceedings will be used for purposes of calculating overtime pay.

## ARTICLE 18

### DISCIPLINE

#### 18.01. Cause for Discharge.

(a) No regular employee, after having completed the introductory period under Section 7.01, shall be disciplined and/or discharged except for just cause. The Employer shall follow a system of progressive discipline. The parties agree that progressive discipline normally requires, prior to suspension or discharge, that an employee be given a written opportunity to correct the deficiency, but that within the principle of progressive discipline, the Employer may impose immediate suspension or discharge for dishonesty, incompetence, misconduct, insubordination, discourteous conduct toward a guest, failure to report to work without just cause, walking off the job during a shift, or drinking alcohol or use of controlled substance, or being under the influence thereof, during the employee's shift.

When an employee who has completed the introductory period is disciplined and/or discharged, the reason therefore will be given to the employee in writing. When an employee is discharged, copies of the written notice to the employee will be sent to the Union within seventy-two (72) hours of the discharge. Upon request by the Union, legible copies of all documents relevant to discipline or discharge, including videotapes, shall be provided to the Union.

(b) Where there is reasonable cause to believe that an employee is under the influence of alcohol or a controlled substance, the employee, after being notified of the contents of this subsection, must consent to an immediate physical examination at an independent medical facility or suffer the penalty of discharge. The Employer shall pay for the cost of the examination, and the employee shall be paid for all time required for the examination. A blood alcohol level at or in excess of the limit prescribed by Nevada State Law constitutes an absolute presumption that the individual is under the influence of alcohol.

18.02. Warning Notices. Warning notices issued to employees must specify the events or actions for which the warning is issued. Warning notices shall be issued to employees as soon as possible after the Employer is aware of the event or action for which the warning notice is issued and has a reasonable period of time to investigate the matter.

A copy of any written warning notice shall be issued to the employee. The employee shall be required to sign all notices for the purposes of acknowledging receipt. Warning notices, written customer complaints, and reports of outside agencies or of the Employer's own security force concerning conduct of an employee shall become null and void one (1) year after the date of

issuance and may not thereafter be used as a basis for or in support of any subsequent discharge or disciplinary action.

18.03. Time of Discharge. No employee shall be discharged on his or her day off or while on Flex Time or leave of absence.

18.04. Disciplinary Suspension. Suspensions shall become null and void one (1) year after the date of issuance and may not thereafter be used as a basis for or in support of any subsequent discharge or disciplinary action.

18.05. MGM Grand will not require or request employees to take a lie detector test.

18.06. MGM Grand will not require or request an employee to resign, or to sign a confession or statement concerning his or her conduct, unless the employee is first given an opportunity to have a Union representative present if the employee so requests.

## ARTICLE 19

### DISPUTE RESOLUTION

19.01. Disputes. The parties agree to utilize the following procedures for resolving the disputes of employees:

(a) Step I. Within fifteen (15) calendar days of the occurrence of the event giving rise to the dispute, or within fifteen (15) calendar days of the time the employee or the Union reasonably could have acquired knowledge of the event, the employee will give notice of the intent to pursue the dispute resolution process. Within seven (7) calendar days after notification, the employee and his or her manager shall meet to resolve the dispute. If the employee desires representation, he or she may request assistance from a Union Steward. The employee, manager and Union Steward, if present, shall complete a report of the meeting on a mutually-agreed form. Although an employee has fifteen (15) calendar days in which to initiate the Step I meeting, in separation cases, if the dispute is filed on the eighth (8<sup>th</sup>) day or later, an employee shall only be eligible for back pay for the first seven (7) days of the fifteen (15)-day period in the event a back-pay award results from the dispute resolution process. An employee shall be eligible for back-pay award for the time period after the fifteen (15)-day period in the event a back-pay award results from the dispute resolution process. Step I shall be considered non-precedential.

(b) Step II. If the issue is not resolved at Step I, the unresolved dispute shall be reduced to writing. The written grievance shall set forth the provision(s) of this Agreement alleged to have been violated, and all known facts known at the time allegedly constituting the violation. At the time a grievance is submitted to the Employer, the Union shall furnish the Employer with copies of any written statements, reports or documents relied on by the Union or the employee to support the grievance. The Employer shall indicate on disciplinary notices whether witnesses are involved. A Step II meeting shall be scheduled and conducted within fifteen (15) calendar days of the filing of the written grievance. The Step II meeting shall be comprised of not more than three (3) representatives of the Employer and three (3) representatives of the Union. For the purpose of attempting to resolve grievances prior to arbitration, the parties, at any meeting prior to the Step II

# **EXHIBIT 6**

# **EXHIBIT 6**



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004

Agency Website: [www.nlrb.gov](http://www.nlrb.gov)  
Telephone: (602) 640-2160  
Fax: (602) 640-2178

December 30, 2016

Hilary B. Muckleroy, Attorney at Law  
MGM Resorts International Operations, Inc.  
840 Grier Drive, Suite 200  
Las Vegas, NV 89119

Ms. Cynthia Thomas  
6076 Alpine Estates Circle  
Las Vegas, NV 89149-2024

Re: MGM Grand Hotel, LLC  
d/b/a MGM Grand  
Case 28-CA-186022

Dear Ms. Muckleroy and Ms. Thomas:

The Region has carefully considered the charge alleging that MGM Grand Hotel, LLC d/b/a MGM Grand (the Employer) violated the National Labor Relations Act. As explained below, I have decided that further proceedings on the charge should be handled in accordance with the deferral policy of the National Labor Relations Board as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). This letter explains that deferral policy, the reasons for my decision to defer further processing of the charge, and the Charging Party's right to appeal my decision.

**Deferral Policy:** The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provision of the applicable contract. This policy is partially based on the preference that the parties use their contractual grievance procedure to achieve a prompt, fair, and effective settlement of their disputes. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Board's Regional Office will defer the charge.

**Decision to Defer:** Based on our investigation, I am deferring further proceedings on the charge in this matter to the grievance/arbitration process for the following reasons:

1. The Employer and Culinary Workers Union Local 226, a/w UNITE HERE International Union (the Union) have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.

2. The allegations that the Employer violated Section 8(a)(1) of the Act by interrogating its employees and giving the impression of surveillance of union and/or other protected concerted activities are encompassed by the terms of the collective-bargaining agreement.

3. The issues of whether the Employer violated Section 8(a)(1) and (3) of the Act by suspending and discharging its employee Cynthia Thomas because she engaged in union and other protected activities, as alleged in the charge, are encompassed by the terms of the collective-bargaining agreement.

4. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.

5. Since the issues in the charge appear to be covered by provisions of the collective-bargaining agreement, it is likely that the issues may be resolved through the grievance/arbitration procedure.

**Further Processing of the Charge:** As explained below, while the charge is deferred, the Regional office will monitor the processing of the grievance and, under certain circumstances, will resume processing of the charge.

*Charging Party's Obligation:* Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, I may dismiss the charge.

*Union/Employer Conduct:* If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and the Charging Party, I may revoke deferral and resume processing of the charge.

*Charged Party's Conduct:* If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed, or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

*Monitoring the Dispute:* Approximately every 90 days, the Regional Office will ask the parties about the status of this dispute to determine if the dispute has been resolved and if continued deferral is appropriate. However, at any time, a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint.

*Notice to Arbitrator Form:* If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the arbitrator sends the award to the parties.

*Review of Arbitrator's Award:* If the grievance is arbitrated, the Charging Party may ask the Board to review the arbitrator's award. The request must be in writing and addressed to me. Because the parties have explicitly authorized the arbitrator to decide the statutory issues in this case, the Board's deferral standards applicable in this case are those set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), which is available on our website, [www.nlr.gov](http://www.nlr.gov). Any request for review of an arbitrator's award should analyze (1) whether the parties explicitly authorized the arbitrator to decide the statutory issue; (2) whether the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) whether Board law reasonably permits the award. The party urging deferral has the burden to prove these standards are met.

*Review of Grievance Settlement:* If the grievance is settled, the Charging Party may ask the Board to review the grievance settlement. The Board's deferral standards applicable to any grievance settlement in this case are also set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014). Any request for review of a grievance settlement should analyze (1) whether the parties intended to settle the unfair labor practice issue; (2) whether the parties addressed the statutory issue in the settlement; and (3) whether Board law reasonably permits the grievance settlement agreement. The party urging deferral has the burden to prove these standards are met. In assessing whether to defer to the settlement, I will also consider the factors identified by the Board in *Independent Stave Co.*, 287 NLRB 740, 743 (1987).

**Charging Party's Right to Appeal:** The Charging Party may appeal my decision to defer this charge by filing an appeal with the General Counsel of the National Labor Relations Board, through the Office of Appeals. An appeal may be filed by submitting the enclosed Appeal Form (form NLRB-4767), which is also available at [www.nlr.gov](http://www.nlr.gov). However, we encourage the Charging Party to submit a complete statement setting forth the facts and reasons why the decision to defer the charge is incorrect.

**Means of Filing:** An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the

December 30, 2016

**General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001.** Unless filed electronically, a copy of the appeal should also be sent to me.

**Appeal Due Date and Time:** The appeal is due on **January 13, 2017**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than January 12, 2017. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

**Extension of Time to File Appeal:** The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before January 13, 2017**. The request may be filed electronically through the **E-File Documents** link on our website [www.nlr.gov](http://www.nlr.gov), by fax to (202) 273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after January 13, 2017, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

**Confidentiality:** We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



Cornele A. Overstreet  
Regional Director

Enclosures

cc: See next page.

MGM Grand Hotel, LLC d/b/a MGM Grand  
Case 28-CA-186022

December 30, 2019

MGM Grand Hotel, LLC d/b/a MGM Grand  
3799 Las Vegas Boulevard, South  
Las Vegas, NV 89109-4319

Culinary Workers Union Local 226, a/w  
UNITE HERE International Union  
1630 South Commerce Street, Suite A-1  
Las Vegas, NV 89102-2700

CAO/SJP/aa

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

**APPEAL FORM**

To: General Counsel  
Attn: Office of Appeals  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

Date:

I am appealing the action of the Regional Director in deferring the charge in

MGM Grand Hotel, LLC d/b/a MGM Grand

Case Name(s).

Case 28-CA-186022

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

\_\_\_\_\_  
(Signature)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
NOTICE TO ARBITRATOR

TO:

\_\_\_\_\_  
(Arbitrator)

\_\_\_\_\_  
(Address)

NLRB Case Number  
**28-CA-186022**

NLRB Case Name: MGM Grand Hotel, LLC d/b/a MGM Grand

A determination has been made by the Regional Director of Region 28 of the National Labor Relations Board to administratively defer to arbitration the further processing of the NLRB charge in the above matter. Further, both parties to the NLRB case have agreed to proceed to arbitration before you in order to resolve the dispute underlying the NLRB charge.

So that the Regional Director can be promptly informed of the status of the arbitration, the undersigned hereby requests that a copy of the arbitration award be sent to Regional Director, Region 28, 2600 North Central Avenue, Phoenix, AZ 85004 at the same time that it is sent to the parties in the arbitration.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

# **EXHIBIT 7**

# **EXHIBIT 7**

---

**From:** Trimmer, Paul T. (Las Vegas) <[TrimmerP@jacksonlewis.com](mailto:TrimmerP@jacksonlewis.com)>  
**Sent:** Thursday, November 09, 2017 8:22 PM  
**To:** A. Mirella Nieto <[amnieto@msh.law](mailto:amnieto@msh.law)>; Sarah Varela <[svarela@msh.law](mailto:svarela@msh.law)>  
**Subject:** RE: 2017-11-07 Subpoena for Production of Records to Cynthia Thomas.pdf - Sent from MaaS360

Mirella- Here are my proposed issues. Although the new MGM Grand agreement is not yet signed, the parties entered into a new deal after December 2014 when Babcock Wilcox was issued. Under GC 15-02, I think we have to include the deferred ulp as a separate issue because the CBA does not otherwise empower the arbitrator to hear statutory NLRA claims.

1. Whether the parties entered into a settlement agreement to resolve a grievance over Cynthia Thomas' January 14, 2016 three day suspension by reducing the suspension to a written warning.
2. Did the Employer violate Article 8.01 of the collective bargaining agreement when it terminated the Grievant?
3. Did the Employer terminate the Grievant in retaliation for engaging in union or other protected concerted activity and thereby violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act?

If either or both of questions two or three are answered in the affirmative, what should be the remedy?

**Paul Trimmer**

Attorney at Law

**Jackson Lewis P.C.**

3800 Howard Hughes Parkway  
Suite 600

Las Vegas, NV 89169

Direct: (702) 921-2472 | Main: (702) 921-2460

[TrimmerP@jacksonlewis.com](mailto:TrimmerP@jacksonlewis.com) | [www.jacksonlewis.com](http://www.jacksonlewis.com)

***Jackson Lewis P.C. is included in the AmLaw 100 law firm ranking and is a proud member of the CEO Action for Diversity and Inclusion initiative***